Federal Court of Appeal  Cour d'appel fédérale

Date: 20170922

Docket: A-156-16

Citation: 2017 FCA 195

CORAM: **PELLETIER J.A.**
RENNIE J.A.
WOODS J.A.

BETWEEN:

ROSETTA WYNTER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 16, 2017.

Judgment delivered at Ottawa, Ontario, on September 22, 2017.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: PELLETIER J.A.
WOODS J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] Rosetta Wynter appeals from a judgment of the Tax Court of Canada, cited as 2016 TCC 103 (Reasons), per Judge Rowe, which upheld a penalty imposed by the Minister of National Revenue under subsection 163(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). The penalty related to a business loss claimed by the appellant in her 2009 income tax return in the amount of $447,148.31. Had the loss been allowed, the appellant would have been entitled to

large tax refunds for the 2009 and prior taxation years. The Minister initially allowed the loss, but ultimately reassessed the appellant and imposed a penalty in the amount of $51,569.49.

[2] The appellant does not dispute that a business did not exist and that there was no basis for claiming a business loss. She only disputes the penalty.

[3] The relevant facts may be briefly summarized.

[4] In 2006, after receiving a phone call from someone unknown to her, the appellant left the accountant who had prepared her returns for many years and started using DSC Lifestyle Services (DSC) to prepare her tax return. Over the four subsequent years she paid DSC roughly $12,000 for their services, a portion of which the appellant understood to be a charitable donation. During each of the four taxation years, she received refunds that were significantly larger than any refund she had received in the previous thirty years. In 2006, the appellant inquired of DSC as to why she was entitled to a large refund. She was told that it was due to her charitable donation. Apart from that query she did not, in the three following years, ask why she was entitled to such large refunds.

[5] The judge found that the appellant did not question the numbers indicating a large business loss despite not having operated a business, and nevertheless, signed the Request for Loss Carryback. He also found that she gave conflicting testimony as to whether she actually noticed the amount of the refund for 2009 which was over $30,000.

[6] In upholding the imposition of the penalty, the judge found the appellant was wilfully blind to a false statement in her 2009 income tax return and, as a result, she came within the legislative requirements of subsection 163(2).

[7] The appellant impugns the judge's reliance on the Tax Court's decision in *Torres v. The Queen*, 2013 TCC 380, 2014 D.T.C. 1028 (*Torres*) for his determination on wilful blindness. While the appellant acknowledges that this Court upheld *Torres* in *Strachan v. Canada*, 2015 FCA 60, [2015] 3 C.T.C. 87, she submits that the formulation of the test applied by the judge was "watered down", and that the proper test is that formulated by the Supreme Court of Canada in criminal cases. The appellant refers in particular to the Supreme Court's decisions in *Sansregret v. The Queen*, [1985] 1 S.C.R. 570 (*Sansregret*) and *R. v. Hinchey*, [1996] 3 S.C.R. 1128, and contends that the penalty could not be imposed because the judge made no finding that the appellant intended to cheat in filing her return and points to the concession by the Crown that the appellant did not "set out to cheat the administration of justice".

[8] The appellant also challenges findings of fact, contending that the judge could not have found that the appellant was "deliberately ignorant" such that "it can almost be said that [she] actually knew" that there was a false statement in her 2009 income tax return.

[9] For the following reasons, I would dismiss the appeal, with costs.

[10] Subsection 163(2) of the Act authorizes the imposition of penalties for a taxpayer, as follows:

(2) Every person who, knowingly, or under circumstances amounting to gross negligence, has made or has participated in, assented to or acquiesced in the making of, a false statement or omission in a return, form, certificate, statement or answer (in this section referred to as a "return") filed or made in respect of a taxation year for the purposes of this Act, is liable to a penalty of the greater of $100 and 50% of the total of…	(2) Toute personne qui, sciemment ou dans des circonstances équivalant à faute lourde, fait un faux énoncé ou une omission dans une déclaration, un formulaire, un certificat, un état ou une réponse (appelé « déclaration » au présent article) rempli, produit ou présenté, selon le cas, pour une année d'imposition pour l'application de la présente loi, ou y participe, y consent ou y acquiesce est passible d'une pénalité égale, sans être inférieure à 100 $, à 50 % du total des montants suivants…

[11] When Parliament uses alternative terms, it is assumed that it intended them to have different meanings. Put otherwise, Parliament does not repeat itself: see Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law Inc., 2016) at 43. Section 163 allows the imposition of penalties where the taxpayer has knowledge *or* in circumstances amounting to gross negligence. The section is not conjunctive, and presumptively, these two terms differ in their meaning and content.

[12] The distinction between gross negligence – determined by an objective assessment of the comportment of the taxpayer – and wilful blindness – determined by reference to the taxpayer's subjective state of mind – has a long history. Admittedly, it is, on occasion, a fine distinction and one that is not always clearly drawn. Nonetheless, Parliament is taken to have been cognizant of the distinction.

[13] A taxpayer is wilfully blind in circumstances where the taxpayer becomes aware of the need for inquiry but declines to make the inquiry because the taxpayer does not want to know, or studiously avoids, the truth. The concept is one of deliberate ignorance: *R. v. Briscoe*, 2010 SCC 13 at paras. 23-24, [2010] 1 S.C.R. 411 (*Briscoe*); *Sansregret* at para. 24. In these circumstances, the doctrine of wilful blindness imputes knowledge to a taxpayer: *Briscoe* at para. 21. Wilful blindness is the doctrine or mechanism by which the knowledge requirement under subsection 163(2) is met.

[14] I turn to the appellant's main argument. The appellant contends that wilful blindness requires evidence sufficient to demonstrate that the taxpayer actually knew the return was false and that the taxpayer "intended to cheat the administration of justice".

[15] The jurisprudence does not support the conclusion that an intention to cheat is a prerequisite for a finding of knowledge, and in particular, of wilful blindness. The decision of the Supreme Court of Canada in *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3 (*Guindon*), removes any doubt. The Supreme Court agreed with the decision of this Court, cited as *Canada v. Guindon*, 2013 FCA 153 at para. 37, [2014] 4 F.C.R. 786, which stated that "the assessment of a penalty under section 163.2 [dealing with tax preparers] is not the equivalent of being 'charged with a [criminal] offence.'" While there is still a mental element present in subsection 163(2), I also note the Supreme Court's endorsement in *Guindon* at paragraphs 60-62 of the reasons of Justice Strayer in *Venne v. The Queen* (1984), 84 D.T.C. 6247, [1984] C.T.C. 223 (*Venne*), and those of the Tax Court in *Sidhu v. The Queen*, 2004 TCC 174 at para. 23, 2004 D.T.C. 2540 that "[t]he burden here is not to prove, beyond a reasonable doubt, *mens rea* to evade taxes."

[16] In sum, the law will impute knowledge to a taxpayer who, in circumstances that suggest inquiry should be made, chooses not to do so. The knowledge requirement is satisfied through the choice of the taxpayer not to inquire, not through a positive finding of an intention to cheat.

[17] While evidence, for example, of an actual intent to make a false statement would suffice to meet the "knowingly" requirement of subsection 163(2), requiring an intention to cheat to establish wilful blindness is inconsistent with the well-established jurisprudence that wilful blindness pivots on a finding that the taxpayer deliberately chose not to make inquiries in order to avoid verifying that which might be such an inconvenient truth. The essential factual element is a finding of deliberate ignorance, as it "connotes 'an actual process of suppressing a suspicion'": *Briscoe* at para. 24. I would add that, in the context of subsection 163(2), references to "an intention to cheat" are a distraction. The gravamen of the offence under subsection 163(2) is making of a false statement, knowing (actually or constructively, i.e., through wilful blindness) that it is false.

[18] Gross negligence is distinct from wilful blindness. It arises where the taxpayer's conduct is found to fall markedly below what would be expected of a reasonable taxpayer. Simply put, if the wilfully blind taxpayer knew better, the grossly negligent taxpayer ought to have known better.

[19] Gross negligence requires a higher degree of neglect than a mere failure to take reasonable care. It is a marked or significant departure from what would be expected. It is more

than carelessness or misstatements. The point is captured in the decision of this Court in *Zsoldos v. Canada (Attorney General)*, 2004 FCA 338 at para. 21, 2004 D.T.C. 6672:

> In assessing the penalties for gross negligence, the Minister must prove a high degree of negligence, one that is tantamount to intentional acting or an indifference as to whether the law is complied with or not. (See *Venne v. R.* (1984), 84 D.T.C. 6247 (Fed. T.D.), at 6256.)

[20] There is no question that, while conceptually different, gross negligence and wilful blindness may merge to some extent in their application. A taxpayer who turns a blind eye to the truth and accuracy of statements made in their income tax return is wilfully blind, and is also grossly negligent. The converse is not, however, necessarily true. A grossly negligent taxpayer is not necessarily wilfully blind. The possibility of this dual characterization of the same conduct may, on occasion, give rise to imprecision in the jurisprudence in the description of the alternative ways in which the Crown may meet its burden. Similarly, the common practice of referring to penalties imposed under subsection 163(2) as “gross negligence penalties” blurs the fact that the penalties may arise under either the knowledge or gross negligence heading. This ought to be avoided. What is at issue under subsection 163(2) is a penalty, which may be imposed either by a finding of knowledge or a finding of gross negligence.

[21] While subjective considerations may play a role in either analysis, gross negligence is determined with reference to an objective test. In particular, where gross negligence is alleged, I would expect consideration of whether the conduct of the taxpayer at issue is such a marked departure from what would be expected that it constitutes a high degree of negligence sufficient to be characterized as a marked departure from the standards, practices, and due diligence expected of a responsible taxpayer. The cautionary words of the Supreme Court of Canada in

Guindon, at paragraph 61, are equally applicable here; these penalties "are meant to capture serious conduct, not ordinary negligence or simple mistakes".

[22] I return to the application of these principles in the context of the subsection 163(2) penalty in the present case.

[23] While the judge at times uses the terms wilful blindness and gross negligence interchangeably, it is nonetheless clear from his reasons that he concluded, based on the evidence (Reasons at paras. 19-21), the analytical framework (Reasons at para. 14), and conclusion (Reasons at paras. 23, 30 and 36) that he found that the appellant was wilfully blind. I see no error in this conclusion.

[24] The judge made a number of factual findings that support his final conclusion, including that "she knew that she knew better" (Reasons at para. 36) and "she was determined not to undertake any significant inquiry that would detract from her ability to receive a refund as promised" (Reasons at para. 30).

[25] The appellant was aware of the many suspicious circumstances surrounding the preparation of her tax return. She was also aware that the Minister denied her claim for a donation in 2006. Awareness of these circumstances alerted the taxpayer to the need to review her tax return. She deliberately chose not to review her tax return and, in doing so, it can be said that, to revert to *Briscoe*, she "in effect" intended to make a false statement. The judge found that

she "did not try to glean even a marginal understanding of what was being declared to CRA on her behalf."

[26] The appellant's argument that the judge failed to take into account relevant facts relating to the appellant's personal circumstances fails. This ground of appeal raises questions of fact or mixed fact and law for which the standard of review is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The reasons of the judge are thorough and demonstrate that he considered the relevant facts and committed no such error.

[27] For these reasons, I would dismiss the appeal with costs.

"Donald J. Rennie"
J.A.

"I agree
J.D. Denis Pelletier J.A."

"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 APRIL 22, 2016, NO. 2012-2348(IT)G

DOCKET:	A-156-16
STYLE OF CAUSE:	ROSETTA WYNTER V. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 16, 2017
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	PELLETIER J.A. WOODS J.A.
DATED:	SEPTEMBER 22, 2017

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