Date: 20071219

Dockets: A-85-07
A-86-07

Citation: 2007 FCA 408

CORAM: **RICHARD C.J.**
DÉCARY J.A.
LÉTOURNEAU J.A.

BETWEEN:

A-85-07

MÉTALLURGIE SYCA INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

- -

A-86-07

CARL JOBIN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Montréal, Quebec, on December 13, 2007.

Judgment delivered at Ottawa, Ontario, on December 19, 2007.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: RICHARD C.J.
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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Facts and issue

[1] These are two appeals from a judgment of Mr. Justice Tardif of the Tax Court of Canada (judge) in which he upheld the decision of the Minister of National Revenue (Minister) to add amounts to the appellant company's income as taxable benefits and to impose penalties on the appellant, Mr. Jobin. The taxation years in dispute are 2000, 2001 and 2002. The two appeals were consolidated and heard together.

[2] The appellant, Mr. Jobin, was the sole shareholder and director of the appellant company during the periods at issue. The appellant, Mr. Jobin, received large amounts from the appellant company as allowances for the use of his vehicle, and these amounts are at the heart of the dispute. As the judge did in paragraph 11 of the reasons for his decision, I am reproducing these amounts, recorded at $0.34 per kilometer, which are set out in paragraph 19(*c*) of the reply to the notice of appeal:

Taxation periods ended	Total amounts paid	Total distances driven
July 31, 2000 (12 months)	$23,628.98	69,497 km
December 31, 2000 (5 months)	$14,506.10	42,665 km
December 31, 2001	$33,174.48	97,572 km
December 31, 2002	$34,524.96	101,544 km

[3] According to the appellants, the vehicle travelled close to 300,000 kilometres during the periods in question whereas, according to the Canada Revenue Agency (Agency), the kilometrage was essentially what the odometer indicated, i.e., approximately 30,000 kilometres.

[4] In support of his submissions, the appellant, Mr. Jobin, essentially argued that the odometer was broken, that he had disconnected it several times; he produced some repair bills, an invoice for the purchase of two sets of tires, one set for winter and the other for summer, and relied on the testimony of two clients who stated that Mr. Jobin had visited them a few times and that he had driven a red Volvo on occasion.

[5] With regard to the odometer, the appellant first explained that the odometer readings taken by the Agency's auditor were misleading because the vehicle's odometer was defective and had had to be replaced.

[6] Next, he stated that he regularly disconnected the wire leading to the vehicle's odometer to produce a false reading in order to extend the warranty by concealing a significant part of the kilometers driven. In other words, the appellant claims to have driven more than 200,000 kilometres with no odometer or speedometer.

[7] The appellant also produced a bundle of weekly reports in support of his argument about the distance that he drove. He claimed that every Thursday or Friday he took note of the kilometres he had driven, having reset his odometer to zero the previous Monday morning.

Analysis of the appellants' submissions

[8] In very detailed reasons for judgment and in summarizing the evidence, the judge made a number of negative credibility findings against the appellant, Mr. Jobin. At the hearing, counsel for the appellants acknowledged this fact as well as the resultant limitations.

[9] However, he attempted, quite skillfully I might add, to make a breach in this almost insurmountable wall that the appellant, Mr. Jobin, erected around himself through his lack of credibility. For the following reasons, counsel for the appellants did not succeed in his efforts.

[10] The first criticism levelled at the judge is that he misapprehended the evidence. Counsel for the appellants based his argument on two examples.

[11] At paragraph 41 of his reasons, the judge refers to reports of meetings with clients that he believes were made during or after the Agency's audit whereas, according to the appellant, Mr. Jobin, the reports were written contemporaneous with the meetings, just as the cheques were that accompanied the reports.

[12] Second, it is alleged that the judge gave little weight to the fact that the Agency's auditor confused gasoline bills with restaurant bills.

[13] Even if these two criticisms are valid, these errors are not sufficient to justify setting aside the findings of fact based on the weakness of the appellants' evidence and explanations, which the judge characterized as implausible: see paragraphs 30 to 39 of the reasons for his decision.

[14] Counsel for the appellants asserts that counsel for the respondent misled the judge regarding the burden of proof that lay on the appellants by relying on *Pallan v. Canada (Minister of National Revenue – M.N.R.)*, [1989] T.C.J. No. 1126 (T.C.C.) and *Kiliaris v. Canada*, [1996] T.C.J. No. 1015 (T.C.C.), which, he says, do not apply in this case. He admits, however, that the judge did not comment on the degree of the burden of proof required of the appellants, so it is difficult for our Court, in this context, to conclude that the judge made a palpable and overriding error warranting our intervention.

[15] As previously mentioned, Mr. Jobin testified that he would disconnect the odometer in his Volvo in order to extend his warranty. Clearly, the total of the kilometers that he submitted and claimed does not by any means correspond to the odometer reading.

[16] The judge expressed doubts as to the feasibility of such a manoeuvre on vehicles equipped with new technology, although he personally knew that this was much easier to do in the 70's.

[17] Counsel for the appellants submits that the judge disregarded the evidence arising from Mr. Jobin's testimony and instead made a finding on the basis of his personal knowledge. With respect, I do not believe that the judge did so.

[18] The transcript of the proceedings does not support this assertion. It is true that the judge expressed doubts as to the ease with which Mr. Jobin said that he could disconnect the odometer, but, on two occasions, the judge emphasized the fact that this was an important element of the evidence and that he was expecting more compelling evidence that what he had heard up to that point: appeal book, volume 5, pages 843 to 846. This evidence was not forthcoming and the judge based his finding on the weakness of the evidence that was presented.

[19] The appellants complain that the judge refused to allow any of the work-related kilometers that Mr. Jobin travelled in his personal Volvo. They ask this Court to [TRANSLATION] "settle the said kilometrage", taking into account the expansion of the appellant company, the list of clients developed between 2001 and 2003, the list of clients approached and certain invoices that were provided as samples.

[20] It is possible for the Court to allocate, for example, between the taxable and non-taxable amounts where there is reliable evidence in the record on which an allocation can be based: see *Marc Forest v. Her Majesty the Queen*, 2007 FCA 362. But for all practical purposes, this is impossible where the allocation or settlement must be made with respect to amounts claimed that the judge believed were not credible and were orchestrated: see paragraphs 42 to 44 of his reasons. The Court would thus be doing indirectly what it cannot do directly, that is, review and undermine the judge's findings on credibility and the resultant findings of fact.

[21] Last, the appellants submit that their good faith was abused because the Agency had obtained a Waiver in Respect of the Normal Reassessment Period from them. They would have agreed to sign such a waiver once they understood that penalties would not be imposed. The waiver was only valid for the year 2000.

[22] The evidence in the record indicates the following sequence. At 9:21 a.m. on May 13, 2004, the appellants received a waiver form from Mr. Pierre Drapeau of the Agency and returned it to him; with respect to the travel allowance deduction that had been disallowed, Mr. Jobin had crossed out [TRANSLATION] “with penalty” and written by hand [TRANSLATION] “without penalty” on the form: see appeal book, volume 3, pages 438 to 440.

[23] At 2:03 p.m. the same day, they received a new waiver form by fax and this time there was no mention of a penalty beside the item [TRANSLATION] “travel allowance disallowed”. The appellants signed this form and returned it Mr. Drapeau.

[24] The second form, and this is regrettable, could perhaps have given the appellants the impression that the Agency had waived the penalties for the travel allowance. But the notice of waiver itself clearly indicates that, if a waiver were signed, the Minister could assess and fix the taxes, interest or penalties: see the form, appeal book, page 442.

[25] Be that as it may, the appellants were not prejudiced because they had been informed that without the waiver, they would be assessed immediately: see Mr. Jobin’s testimony on this point,

appeal book, pages 829 and 832. And in fact, if they had refused to sign the waiver, they would have been legitimately reassessed, and, in all likelihood, with penalties: see *Karda v. Her Majesty the Queen*, 2006 FCA 238, at paragraph 2.

[26] For these reasons, I would dismiss the appeals in dockets A-85-07 and A-86-07 with costs, limited to one set of costs for the hearing.

"Gilles Létourneau"

J.A.

"I concur.
J. Richard, C.J."

"I concur.
Robert Décary, J.A. "

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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APPEARANCES:

François Montfils	FOR THE APPELLANT
Suzanne Morin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Therrien Couture Lawyers, LLP Saint-Hyacinthe, Quebec	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT

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