Date: 20100203

Docket: A-124-09

Citation: 2010 FCA 35

CORAM: **NADON J.A.**
EVANS J.A.
PELLETIER J.A.

BETWEEN:

IAN BAIRD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on November 12, 2009.

Judgment delivered at Ottawa, Ontario, on February 3, 2010.

REASONS FOR JUDGMENT BY: NADON J.A.

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

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REASONS FOR JUDGMENT

NADON J.A.

Introduction

[1] This is an appeal from a decision of Mr. Justice Margeson of the Tax Court of Canada, 2009TCC24, dated February 2, 2009, which dismissed the appellant's appeal from the Minister of National Revenue's (the "Minister") reassessments of his 2001, 2002 and 2003 taxation years.

[2] In reassessing the appellant for the taxation years at issue, the Minister disallowed business losses in the amount of $539,419 for 2001 and $559,338 for 2002. The Minister also reassessed the appellant's tax liability for taxation year 2003 by disallowing $79,836 of non-capital losses carried forward from previous taxation years.

[3] The main issue before the Tax Court was whether the appellant's losses in taxation years 2001 and 2002, following the disposal of stock options in BCE Emergis ("Emergis"), were on account of capital or income. In upholding the Minister's reassessments, the Judge found that the appellant was neither carrying on business as a trader in securities nor was he engaged in an adventure in the nature of trade with respect to his Emergis shares. The Judge also concluded that the appellant was not entitled to carry forward non-capital losses in taxation year 2003 resulting from the disposition of shares in the 2001 and 2002 taxation years.

[4] The appeal before us is in respect only of the Judge's determination that the appellant was not engaged in an adventure in the nature of trade.

The Facts

[5] The following summary of the facts will suffice to dispose of the appeal.

[6] The appellant was employed with Emergis from 1998 to February 2000. During the course of his employment, he was granted 62,000 Emergis stock options, which were exercisable until December 2000 at a fixed option price of $7 to $10 dollars a share. When he left his employment in

February 2000, the market value of his stock options was somewhere between $140 to $150 a share, i.e. a total value of $8 million to $10 million. In December 2000, he borrowed approximately $700,000 and exercised his options. At that time, the market value of the Emergis shares was $42 a share, i.e. a value of approximately $2.6 million.

[7] In March and April 2001, the appellant sold approximately 50% of his 62,000 shares. The remaining shares were sold in March 2002. As a result, the appellant incurred losses in the amounts of $539,419 and $559,338 which he reported as being on account of income. In taxation year 2003, he claimed a non-capital loss of $79,837, which he believed was available for carryforward from previous years.

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[8] At paragraphs 142 and 143 of his Reasons, the Judge opined as follows with respect to the appellant's intention concerning the Emergis shares:

> [142] Counsel for the Appellant said that in this case we have "intention together with indicia of trade". However this Court is satisfied that the most substantial evidence about the Appellant's intention here was his declared intention, after the fact and the number of trades that he did were not so substantial as to clearly indicate that he was a "trader".
>
> [143] His declared intention must be corroborated by his whole course of conduct. In this case the Court is satisfied that his course of conduct does not lead to the conclusion that he was a trader.

[9] Thus, in the Judge's view, the appellant's course of conduct did not corroborate his declared intention of "trading" with respect to his shares. The Judge so concluded by reason of his findings with regard to the relevant facts, namely:

1. The Emergis stock options were granted to the appellant as a result of his employment and not because of any independent research on his part.
2. The appellant left his employment at Emergis to support his wife who was training for the 2000 Olympics in Sydney. Following his departure from Emergis, the appellant spent most of his time assisting and supporting his wife's career.
3. The amount of time during which the appellant held on to his Emergis shares was not indicative of what a trader would have done in the circumstances. The appellant's trading pattern was also not indicative of the actions of a trader. More particularly, the appellant sold some of his shares when he was instructed to do so by Price Waterhouse so as to maintain a more diversified portfolio.
4. The appellant sold shares in 2000 at a profit and reported his profit as being on account of capital.
5. The appellant did not report any expenses related to the office which he purported to have in his home.
6. The appellant's trading activities during the period at issue were limited.
7. The appellant failed to call his wife as a witness.

To these findings, I would add that the Judge inferred, at paragraph 170 of his Reasons, that the appellant's contention that he was engaged in an adventure in the nature of trade with regard to his Emergis shares "was opportunistic tax planning triggered by the losses incurred in those years".

[10] As a result, the Judge concluded at paragraph 173 of his Reasons that the appellant had failed to meet his burden of demonstrating "… that he was a trader or involved in an adventure in the nature of trade, during the years in issue". The Judge further concluded, at paragraph 174, that the buying and selling of shares by the appellant during taxation years 2001 and 2002 did "… not constitute a business as defined in sub-section 248(1) of the Act". Lastly, the Judge stated that "… the losses incurred during those years resulting from the disposition of his shares were not losses from a business under subsection 9(2) of the Act but were capital losses pursuant to subsection 9(2) of the Act."

Appellant's Submissions

[11] The appellant makes a number of submissions in support of his view that the learned Judge erred in failing to find that he was engaged in an adventure in the nature of trade with regard to his Emergis shares. First, he submits that he was at all material times engaged in an adventure in the nature of trade. Second, he argues that the Judge erred in failing to properly distinguish between the issue of whether he was a trader in securities and the issue of whether he was engaged in an adventure in the nature of trade. Lastly, he submits that the Judge erred in drawing a negative inference against him because of his failure to call his wife to give evidence before the Tax Court of Canada.

Analysis

[12] A few words concerning the standard of review are in order. The question of whether the appellant was engaged in an adventure in the nature of trade is primarily a factual one. Thus, in

order to succeed, the appellant must satisfy us that, absent an error on a question of law, the Judge made a palpable and overriding error in his assessment of the evidence and, more particularly, with regard to the inferences which he drew from his findings. As the Supreme Court of Canada held in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paragraph 22:

> [22] … If there is no palpable and overriding error with respect to the underlying facts that the Trial Judge relies on to draw the inference, then it is only when the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. …

[13] I now turn to the heart of the matter before us: whether the Judge erred in concluding that the appellant was not engaged in an adventure in the nature of trade.

[14] Although the definition of "business" found in section 248(1) of the Act includes "an adventure or concern in the nature of trade", it does not define that concept. In *Principles of Canadian Income Tax Law*, 5th ed.(Toronto: Carswell, 2005) at p. 333, the learned authors, Peter Hogg, Joanne E. Magee and Jinyan Li, explain the concept as follows:

> An adventure or concern in the nature of trade is an isolated transaction (which lacks the frequency or system of a trade) in which the taxpayer buys property with the intention of selling it at a profit and then sells it (normally at a profit, but sometimes at a loss). Accordingly, when a taxpayer enters into an isolated transaction (or only few transactions), he or she is not a trader. But, if the transaction was a speculative one, intended to yield a profit, it is in the name of a business.

[15] In *Friesen v. Canada*, [1995] 3 S.C.R. 103, Major J., writing for a majority of the Supreme Court of Canada, remarked at page 115 that the concept of an adventure in the nature of trade is a judicial creation designed to determine which purchase and sale transactions are of a business nature

and which are of a capital nature. Major J. then made the point that for a purchase and sale to constitute an adventure in the nature of trade, there had to be a "scheme for profit-making". In his view, there was a requirement for the taxpayer to have had an intention of gaining a profit from his transaction and, in that regard, he referred to Interpretation Bulletin IT-459: "Adventure or Concern in the Nature of Trade" (Sept. 8, 1980), which sets out the relevant tests found in the case law for a determination of whether a transaction constitutes an adventure in the nature of trade. Paragraph 4 of IT-459 provides as follows:

> In determining whether a particular transaction is an adventure or concern in the nature of trade the Courts have emphasized that all the circumstances of the transaction must be considered and that no single criterion can be formulated. Generally, however, the principal tests that have been applied are as follows:
>
> 1. whether the taxpayer dealt with the property acquired by him in the same way as a dealer in such property ordinarily would deal with it;
> 2. whether the nature and quantity of the property excludes the possibility that its sale was the realization of an investment or was otherwise of a capital nature, or that it could have been disposed of other than in a transaction of a trading nature; and
> 3. whether the taxpayer's intention, as established or deduced, is consistent with other evidence pointing to a trading motivation.
>
> [Emphasis added]

[16] In determining the issues before him, the Tax Court Judge made reference to a number of cases. However, with respect to the concept of an adventure in the nature of trade, he primarily relied on the Supreme Court's decision in *Irrigation Industries Ltd. v. Minister of National Revenue*, [1962] S.C.R. 346; (1962) C.T.C. 215.

[17] In *Irrigation Industries, supra*, the appellant, a limited company incorporated pursuant to the *Companies Act*, R.S.A. 1955, c. 53, of the province of Alberta, purchased, in February 1953, 4000

treasury shares of another company, Brunswick Mining and Smelting Corporation Ltd., at $10 per share, for a total purchase price of $40,000. In March and June 1953, the appellant sold its shares and realized a profit of $26,897.50 from the purchase and sale of its 4000 shares. The issue before the Supreme Court was stated as follows by Martland J. who wrote for the majority at paragraph 6 of his Reasons:

> 6. The issue in this appeal is as to whether an isolated purchase of shares from the treasury of a corporation and subsequent sale thereof at a profit, not being a part of the business being carried on by the purchaser of the shares or in any way related to it, constitutes an adventure in the nature of trade so as to render such profit liable to income tax.

[18] In other words, was the profit realized by the appellant on account of capital or on account of income?

[19] In disposing of the issue before the Court in that case, Martland J. made a number of comments which remain relevant to this day. First, he indicated at paragraph 13 of his Reasons that he found it difficult to conceive that any purchaser of securities did not have "some intention of disposing of them if their value appreciates to the point where their sale appears to be financially desirable". He then said that if the intention to sell shares at a profit was dispositive of the issue, "then any purchase and sale of securities must constitute an adventure in the nature of trade, …". He therefore indicated that the issue of whether an isolated transaction of shares constituted an adventure in the nature of trade could not "be determined solely" on the basis of whether the purchaser intended to sell his shares if a profit could be made. He then said at paragraph 14 of his Reasons:

> In my opinion, a person who puts money into a business enterprise by the purchase of the shares of a company on an isolated occasion, and not as a part of his regular business, cannot be said to have engaged in an adventure in the nature of trade merely because the purchase was speculative in that, at that time, he did not intend to hold the shares indefinitely, but intended, if possible, to sell them at a profit as soon as he reasonably could. I think that there must be clearer indications of "trade" than this before it can be said that there has been an adventure in the nature of trade. As Scott L.J. said, when delivering the judgment of the Court of Appeal in *Barry v. Cordy*, [1946] 2 All E.R.. 396 at p. 400:
>
> > That a single transaction may fall within Case 1 is clear; but, to bring it within, the transaction must bear clear indicia of "trade"; e.g., *Martin v. Lowry*, (1925) 11 Tax Cas. 297—the single purchase of a vast quantity of linen for re-sale; or *Rutledge v. Commissioners of Inland Revenue*, (1929) 14 Tax Cas. 495, where there was a single purchase of paper. Unless *ex facie* the single transaction is obviously commercial, the profit from it is more likely to be an accretion of capital and not a yield of income.
>
> [Emphasis added]

[20] Martland J. then turned to the decision of the learned President of the Exchequer Court in *Minister of National Revenue v. Taylor* (1956), C.T.C. 189, where Thorson P., after reviewing a number of leading English and Scottish cases pertaining to the meaning of an adventure in the nature of trade, formulated a number of general propositions useful in determining whether or not a particular transaction constitutes an adventure in the nature of trade. At paragraph 17 of his Reasons, Maitland J. summarized those propositions which Thorson P. characterized as positive propositions:

> The positive tests to which he refers as being derived from the decided cases as indicative of an adventure in the nature of trade are: (1) Whether the person dealt with the property purchased by him in the same way as a dealer would ordinarily do and (2) whether the nature and quantity of the subject-matter of the transaction may exclude the possibility that its sale was the realization of an investment, or otherwise of a capital nature, or that it could have been disposed of otherwise than as a trade transaction.

[21] Thorson P., in *Taylor, supra*, also formulated a number of propositions which he characterized as negative propositions. These propositions were set out by Cartwright J. in his dissenting reasons in *Irrigation Industries, supra*, at paragraph 49 of his Reasons:

> On the negative side:
>
> (i) The singleness or isolation of a transaction cannot be a test of whether it was an adventure in the nature of trade; it is the nature of the transaction, not its singleness or isolation that is to be determined.
>
> (ii) It is not essential to a transaction being an adventure in the nature of trade that an organization be set out to carry it into effect.
>
> (iii) The fact that a transaction is totally different in nature from any of the other activities of the taxpayer and that he has never entered upon a transaction of that kind before or since does not, of itself, take it out of the category of being an adventure in the nature of trade.
>
> (iv) The intention to sell the purchased property at a profit is not of itself a test of whether the profit is subject to tax for the intention to make a profit may be just as much the purpose of an investment transaction as of a trading one. The considerations prompting the transaction may be of such a business nature as to invest it with the character of an adventure in the nature of trade even without any intention of making a profit on the sale of the purchased commodity.

[22] With these principles in mind, I now turn to the appellant's arguments. I will deal first with his submission that the Judge failed to properly distinguish between the two issues that were before him. More particularly, the appellant says that the only paragraphs in the Judge's Reasons which pertain to the issue of an adventure in the nature of trade are paragraphs 133 to 139, 170 and 173, adding that the Judge's findings concerning the time spent by him assisting and supporting his wife's Olympic endeavours and the manner in which he treated the distribution of shares, other than the Emergis shares, were of no relevance to the question of whether he was engaged in an adventure in the nature of trade.

[23] Initially, I found the appellant's submission attractive. However, after a careful review of the Judge's Reasons, I must conclude that the appellant's submission is without merit. Although the Judge's Reasons are not as clear and expansive as they perhaps could have been with regard to his analysis concerning an adventure in the nature of trade and in separating his analysis with regard to each of the two issues before him, there can be no doubt that the Judge did address and deal with the issue of whether the appellant was engaged in an adventure in the nature of trade. Even though a number of the Judge's findings were not relevant to that issue, that does not detract from the fact that he sufficiently dealt with the issue so as to allow us to understand his reasoning. Whether or not the Judge made any error in reaching his conclusion is a different question which I will shortly address.

[24] I now turn to the appellant's argument that the Judge erred in drawing a negative inference against him by reason of his failure to call his wife as a witness. More particularly, the appellant takes issue with the Judge's comments found at paragraph 172 of his Reasons, where he says:

> [172] The Court must also draw a negative inference against the Appellant because his wife did not give evidence. Certainly one could have expected her to have been able to give relevant evidence with respect to the Appellant's business and, in particular, could have testified as to the amount of time that the Appellant spent during the relevant years on her training and travelling with her to many places where she took part in sports events.

[25] In my view, even if the Judge erred in making a negative inference against the appellant, his error is not one which warrants this Court's intervention. In other words, I am satisfied that if there is an error on the Judge's part, the error is not an overriding one. As Fish J. said, writing for a

majority of the Supreme Court of Canada, in *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 at paragraph 55:

> [55] "Palpable and overriding error" is at once an elegant and expressive description of the entrenched and generally applicable standard of appellate review of the findings of fact at trial. But it should not be thought to displace alternative formulations of the governing standard. In *Housen*, for example, the majority (at para. 22) and the minority (at para. 103) agreed that inferences of fact at trial may be set aside on appeal if they are "clearly wrong". Both expressions encapsulate the same principle: an appellate court will not interfere with the trial judge's findings of fact unless it can plainly identify the imputed error, and that error is shown to have affected the result.
>
> [Emphasis added]

[26] I share the view stated above because I am satisfied that the testimony that the appellant's wife could have offered was relevant only to the issue of whether her husband was a trader in securities. There can be no doubt, in my mind, that the amount of time spent by the appellant in supporting his wife was not relevant to the issue of whether he was engaged in an adventure in the nature of trade. Considering what the Judge wrote at paragraph 172 of his Reasons, I also believe that that was his view. I am also of the view that, in any event, the appellant's wife's testimony would not likely have been helpful in determining whether he was engaged in an adventure in the nature of trade. In that regard, I have in mind that portion of the appellant's testimony where he clearly indicated that he did not consult or seriously discuss his business endeavours with his wife (see: Transcript of the evidence, Vol. II of the Appeal Book, pp.131-132). Consequently, I am satisfied that if the Judge erred in drawing a negative inference against the appellant, his error did not have any effect on the result of the case.

[27] The appellant's last submission is that he was engaged in an adventure in the nature of trade in dealing with his Emergis shares. Relying on the factors formulated by Thorson P. in *Taylor, supra*, the appellant says that his testimony with regard to his intention to sell his shares "at the first and best opportunity to make a profit" was uncontradicted, that he had the special knowledge of the market in which he traded, such as a trader would have had, that the number of transactions which he undertook are not determinative and, finally, that the evidence revealed indicia of trading.

[28] The present appeal has again highlighted the difficulty of determining, in a case such as this one, the boundary between income and capital gains and, hence, the difficulty of determining whether a taxpayer is engaged in an adventure in the nature of trade. The taxpayer's intention, at the time of acquiring the property at issue, is always a highly relevant factor which can only be determined by examining the taxpayer's entire course of conduct. Further, I would echo the words of Martland J. in *Irrigation Industries, supra*, where he indicated at paragraph 14 of his Reasons that a taxpayer will not be found to have engaged in an adventure in the nature of trade with respect to the sale of shares on the sole ground that his "purchase was speculative in that, at that time, he did not intend to hold his shares indefinitely, but intended, if possible, to sell them at a profit as soon as he reasonably could", adding that clearer indications of "trade" have to be shown before it could be said that the taxpayer was engaged in an adventure in the nature of trade. Major J., in *Friesen, supra*, put it in a slightly different way when he said that he expected to find a "scheme for profit making" before concluding that a taxpayer was engaged in an adventure in the nature of trade.

[29] In the present matter, Margeson J. carefully reviewed the appellant's course of conduct, made factual findings and found that the taxpayer did not behave as a trader in regard to his Emergis shares. Consequently, he concluded that the appellant was not engaged in an adventure in the nature of trade. In my view, it was clearly open to him, on the evidence, to so conclude.

[30] Hence, I have not been persuaded that the Judge made any palpable and overriding error which would allow us to intervene. More particularly, I can find no basis to interfere with the Judge's findings either with respect to the appellant's intention or with respect to his entire course of conduct. I have also not been able to find, contrary to the appellant's submission, any indicia of trade which would support his argument that the Judge erred in making his determination. Ultimately, the appellant is asking us to re-weigh the evidence adduced before Margeson J. Absent any error of law or any palpable and overriding error with respect to the facts, that course of action is not open to us.

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

"M. Nadon"

J.A.

"I agree.
John M. Evans J.A."

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

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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