

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20111018

Docket: A-420-10

Citation: 2011 FCA 288

**CORAM: EVANS J.A.
LAYDEN-STEVENSON J.A.
STRATAS J.A.**

BETWEEN:

**DUNDURN STREET LOFFTS INC.
and ALEXANDER STREET LOFTS
DEVELOPMENT CORPORATION INC.**

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on October 5, 2011.

Judgment delivered at Vancouver, British Columbia, on October 18, 2011.

REASONS FOR JUDGMENT BY:

STRATAS J.A.

CONCURRED IN BY:

EVANS J.A.
LAYDEN-STEVENSON J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] This is an appeal from a judgment of the Tax Court of Canada (per Justice Favreau): 2010 TCC 553.

[2] The issue in this appeal is whether the appellants are barred under the doctrine of issue estoppel from relitigating the quantum of net tax and penalties owing under certain reassessments

made under the *Excise Tax Act*, R.S.C. 1985, c. E-15. The bar against relitigating quantum was said to arise from findings of fact made in a criminal proceeding against the appellants. In that criminal proceeding, the appellants were convicted for fraud concerning claims for input tax credits. The input tax credits, found to be fraudulently claimed, fell within the period covered by the reassessments.

[3] The Tax Court concluded that issue estoppel applied to bar the appellants from relitigating. It also concluded that it would not exercise its discretion in favour of allowing the appellants to relitigate.

[4] As there are no grounds on which these conclusions can be set aside, I would dismiss the appeal with costs.

A. The reassessments in issue

[5] In 2000, the Minister issued reassessments against the appellants totalling \$702,646 in net tax and penalties. The basis of the reassessments was that the appellants improperly claimed input tax credits from December 17, 1996 to January 31, 1999.

B. The earlier proceedings that are said to give rise to the bar

[6] In 2004, the appellants and their director and officer, Mr. Stelmaszynski, were charged with fraud and attempted fraud under section 327 of the Act. Specifically, they were charged with fraudulently claiming or attempting to claim refunds under the Act by claiming false input tax credits in their GST returns.

[7] After a seventeen day trial in the Ontario Superior Court of Justice, the appellants and Mr. Stelmaszynski were convicted.

[8] Mr. Stelmaszynski was sentenced to a period of imprisonment. The appellants and Mr. Stelmaszynski were fined jointly a total amount of \$702,646.59, the amount of the fraud and attempted fraud alleged in the charge: *R. v. Alexander Street Lofts Development Corp.*, [2005] G.S.T.C. 141 (Ont. S.C.J.).

[9] The amount of the fine was in accordance with the specific formula set out in paragraph 327(2)(a) of the Act: the fine was “100%...of the amount of the tax or net tax that was sought to be evaded.”

[10] The amount of the fine, *i.e.*, the amount of the tax sought to be evaded, is the amount the Minister seeks in the reassessments presently before the Tax Court.

[11] The appellants' appeal from their conviction and sentence was dismissed: *R. v. Alexander Street Lofts Development Corporation Inc.*, 2007 ONCA 309. Leave to appeal to the Supreme Court was dismissed: (2007), 248 OAC 398. The criminal proceedings became final at that point.

C. The later proceedings in the Tax Court

[12] Following their conviction, the appellants appealed the reassessments to the Tax Court. Somewhat later, the respondent brought a motion in the Tax Court for an order seeking to bar the appellants from relitigating the quantum of net tax and penalties owing under the reassessments.

[13] The Tax Court granted that order. It found that the appellants were barred from litigating the quantum of net tax and penalties owing under the reassessments under the doctrine of issue estoppel. Issue estoppel is one of three doctrines aimed at preventing relitigation, the other two being abuse of process and collateral attack: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (issue estoppel); *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (abuse of process); *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (collateral attack).

[14] The Tax Court found that the preconditions for issue estoppel were met. This finding was not seriously contested in this Court. The Tax Court committed no reviewable error in making this finding:

- *Same question.* The question before the Tax Court – the amount of the tax owing – was decided in the criminal proceedings. As mentioned in paragraph 9, above, for the purposes of calculating the fine under paragraph 327(2)(a) of the Act, the Ontario Superior Court of Justice had to make a finding regarding the amount of tax the appellants sought to evade.
- *Finality.* The criminal proceedings culminated in the decision of the Supreme Court to refuse leave to appeal. The proceedings are final.
- *Identity of parties.* The appellants and the respondent, Her Majesty the Queen, are parties in both the criminal proceedings and the Tax Court proceedings.

(see *Danyluk, supra* at paragraph 25.)

[15] The Tax Court went on to consider whether, in its discretion, it should allow relitigation. After examining the circumstances of this case, the Tax Court declined to exercise its discretion in favour of relitigation.

D. The main issue on appeal to this Court: the Tax Court’s decision not to exercise its discretion in favour of relitigation

[16] Argument in this Court focused on the Tax Court’s decision not to exercise its discretion in favour of relitigation. This is primarily a fact-based, discretionary decision. For this Court to

interfere, we must find that the Tax Court's decision was vitiated by palpable and overriding error. I see no such error.

[17] In this Court, broadly speaking, the appellants suggest that the quantum of the tax that was found to have been evaded was never actually calculated in the Ontario Superior Court of Justice. This, they say, should have led the Tax Court to exercise its discretion in favour of allowing the quantum of tax to be relitigated.

[18] The appellants allege that the issue of quantum was withdrawn from the jury and was never actually calculated by the presiding Justice in the criminal proceedings. Instead, counsel representing the appellants and Crown counsel simply assumed that the amounts of evaded tax in issue were as alleged in the charges. The presiding Justice simply adopted that assumption as the basis of her decision regarding the quantum of the fine.

[19] The appellants' submission gains some force from observations made by the Court of Appeal for Ontario. It noted that the trial judge assumed the quantum of tax evaded and that it would have been better if the trial judge had made a specific finding on this based on the evidence before her: see paragraphs 30-32.

[20] In answer to this issue, the Tax Court found (at paragraph 24) that the amounts in issue "formed an essential and integral element" in the criminal proceedings. Although this is true in the sense that the amounts formed the basis for the fine, the Tax Court's answer does not directly

address the appellants' main concern, namely that the amounts in issue were only assumed, not determined.

[21] Nevertheless, the Tax Court's refusal to allow relitigation was amply supported by other considerations it identified. Some of these considerations concerned Mr. Stelmaszynski, who was not a party to the Tax Court proceedings but, as the appellants' officer and director, controlled their cases in the Tax Court. The Tax Court found as a fact that Mr. Stelmaszynski had no interest in vindicating any rights of the appellants concerning the amounts in issue. Instead, he was using the Tax Court's proceedings to relitigate the criminal case against him and to clear his own name (at paragraph 26). Further, the Tax Court found that the appellants were defunct, have no assets and had not yet even paid their criminal fine (at paragraph 27). Finally, the Tax Court expressed concern about judicial economy, possible consistency of outcomes between the criminal proceedings and the Tax Court proceedings, and the integrity of the administration of justice (at paragraph 27).

[22] There is one further consideration that strongly supports the Tax Court's refusal to allow relitigation. By the time of the criminal trial, the appellants already had in hand the tax reassessments against them. They knew they could appeal those reassessments on appeal to the Tax Court. With that knowledge and with a real risk of a finding of issue estoppel in the Tax Court, the appellants chose during the sentencing phase of the criminal proceedings not to seriously contest the quantum of tax said to have been evaded. When the appellants made that choice, they were represented by counsel. There is no evidence suggesting that that choice was somehow accidental or

mistaken. There is no evidence of any attempt to reserve future rights. In my view, there is no ground for relieving the appellants from the consequences of their choice.

[23] Finally, in order for the discretion to be exercised in favour of relitigation, the circumstances favouring it must outweigh the important public policies against it. These public policies include the need for finality, the avoidance of duplicative litigation, the concern about potentially inconsistent results, and the incurring of unnecessary costs: *Danyluk, supra* at paragraph 18. The Tax Court was not satisfied that the circumstances favouring relitigation outweighed these important public policies. There is no ground to interfere with that conclusion.

E. Proposed disposition

[24] Therefore, I would dismiss the appeal with costs.

"David Stratas"

J.A.

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

"I agree
Carolyn Layden-Stevenson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-420-10

**APPEAL FROM AN ORDER THE HONOURABLE JUSTICE RÉAL FAVREAU
DATED OCTOBER 28, 2010, NO. 2005-2906(GST)G**

STYLE OF CAUSE: Dundurn Street Loffts Inc. and
Alexander Street Lofts Development
Corporation Inc. v. Her Majesty the
Queen

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 5, 2011

REASONS FOR JUDGMENT BY: Stratas J.A.

CONCURRED IN BY: Evans J.A.
Layden-Stevenson J.A

DATED: October 18, 2011

APPEARANCES:

Adam J. Stelmaszynski

FOR THE APPELLANTS

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