Federal Court of Appeal Cour d'appel fédérale

Date: 20130215

Dockets: A-409-11
A-405-11
A-406-11
A-407-11
A-408-11
A-410-11

Citation: 2013 FCA 34

CORAM: PELLETIER J.A.
GAUTHIER J.A.
MAINVILLE J.A.

Docket: A-409-11

BETWEEN:

BRIAN BARKWILL

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-405-11

BETWEEN:

DONALD CERCONE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-406-11

BETWEEN:

TOM OLIVO

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-407-11

DAN DAIR

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-408-11

DONALD CHRISHOLM

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Docket: A-410-11

JENNIFER CASS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on January 30, 2013.

Judgment delivered at Ottawa, Ontario, on February 15, 2013.

REASONS FOR JUDGMENT BY: PELLETIER J.A

CONCURRED IN BY: GAUTHIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] This is an appeal from a decision of the Tax Court of Canada dismissing 6 appeals which were heard together on common evidence. Appeals from that decision were taken to this Court and were heard together on a common record. The appellants and the docket numbers are as follows: Donald Cercone (A-405-11), Tom Olivo (A-406-11), Dan Dair (A-407-11), Donald Chisholm (A-408-11), Brian Barkwill (A-409-11), Jennifer Cass (A-410-11) (collectively, the Taxpayers). A copy of these reasons will be placed in each file together with a formal judgment in each appeal.

[2] The appeals arise from transactions in which the Taxpayers purchased shares in one of three companies from a securities dealer for $1 per share and, within a very short period of time, contributed them to their individually directed registered retirement savings plans (RRSPs). The Trustees of these RRSPs issued contribution receipts in which the contributed shares were valued far in excess of the purchase price. The Taxpayers then claimed a deduction from income for their contribution pursuant to paragraph 60(i) and subsection 146(5) of the *Income Tax Act* R.S.C. 1985 c.1 (5th Supp.) (the ITA). While the amounts vary somewhat, for the sake of simplicity I will use $5 as the fair market value attributed to the shares by the Trustees at the date they were contributed to the Taxpayers' RRSPs.

[3] The Minister disallowed the Taxpayers' claim for a deduction on the basis that the Taxpayers' RRSPs had acquired the shares for a consideration greater than the fair market value of the shares at the time of their acquisition, as provided in subsection 146(9) of the ITA. The Minister disallowed the deduction, in whole or in part, according to whether the particular shares were a qualified investment, as defined in section 146(1) of the ITA and added the disallowed amount to the Taxpayers' income for the year, pursuant to subsection 146(9) in the case of shares which were qualified investments and 146(10) in the case of shares which were not.

[4] It is common ground that the shares in one of the companies, Kenartha Oil & Gas Company Limited (Kenartha), were a qualified investment but the status of the other two companies, Alliance Explorations Ltd. (Alliance) and Otis Winston Ltd (Otis), was an issue.

[5] In the Tax Court of Canada, the issues arising from the Minister's assessment were the fair market value of the shares at the time they were acquired by the Taxpayers' RRSPs and whether Alliance and Otis were qualified investments. Before this Court, the only issue was the question of the valuation of the shares.

[6] At the opening of the trial, counsel for the Taxpayers indicated that he intended to call only one witness, whom he wished to have qualified as an expert witness. The witness, Mr. Fox was examined and cross-examined on his qualifications and experience. In summary, Mr. Fox has extensive experience in the area of regulatory compliance for participants in the securities industry but has no formal qualification in accounting or valuation and no relevant experience in either of those fields.

[7] The expert qualification sought for Mr. Fox was with respect to "how RRSPs are considered or processed within trust companies and how their value is determined" (Appeal Book, p. 205)

[8] It should be noted here that the Crown had experts of its own who had prepared expert reports on the fair market value of the shares in issue, which had been disclosed to counsel for the Taxpayers. While those reports are not before us, and were not before the Tax Court of Canada, Mr. Fox's evidence suggests that they proposed a particular method of determining the fair market value of shares with which he disagreed.

[9] In argument, counsel for the Taxpayers took the position that Mr. Fox was not being called to give evidence as to the values of the shares in question. Counsel said that Mr. Fox was being

called to give evidence as to how entities who are trustees for RRSPs comply with the regulatory requirements imposed on them. On the issue of valuation, counsel said that Mr. Fox would be asked how these trustees establish fair market value but he would not be asked to undertake such an exercise himself. The relevance of his evidence, according to counsel, was that once it was understood how such entities were regulated and how they established share values, then the Court would be in a position to conclude that the values assigned to these shares in these cases by the Trustees was the fair market value.

[10] Near the end of counsel's submissions, the following exchange took place between the Tax Court Judge and counsel for the Taxpayers:

(Appeal Book, p. 231, l. 15 to p. 233, l.6):

JUSTICE PIZZITELLI: If I understand you correctly, Mr. Ferguson, I just want to make sure I am on the same page here, what you are suggesting is that his evidence with respect to how the two trust companies involved here would accept a valuation, is relevant, but you are not calling the trust companies as witnesses here?

MR. FERGUSON: No.

JUSTICE PIZZITELLI: The witness here has confirmed he hasn't acted for the trust companies or reviewed anything from them. Is that correct?

MR.FERGUSON: Absolutely, yes.

JUSTICE PIZZITELLI: What exactly would he be testifying to?

MR. FERGUSON: He is going to be testifying to, Your Honour, how the –

JUSTICE PIZZITELLI: General industry practices?

MR. FERGUSON: Yes.

JUSTICE PIZZITELLI: Could you point out to me how the evidence in general industry practices would be relevant to the specific trust company practices involved if he hasn't reviewed them? Are you asking the Court to assume that the trust companies followed general industry practice?

> MR. FERGUSON: I am asking to assume, Your Honour, that the trust companies are not dishonest or not in any way negligent. I am asking you to accept the evidence of the general course as what normally happens, as it did happen. There was no evidence I don't think that anybody can bring, that anything else happened.
>
> JUSTICE PIZZITELLI: Well, direct evidence in the trust companies can certainly be brought.
>
> MR. FERGUSON: I understand. That would be – but the trouble is locating the people who did it and getting anything that might be hearsay, because those people – this is now eight years ago, Your Honour, so that is part of the problem.

[11] The Crown opposed Mr. Fox's qualification as an expert on share valuation on the basis that he had neither the training nor the experience to offer opinion evidence on share values.

[12] The Tax Court Judge refused to qualify Mr. Fox as an expert with respect to share valuations since he had neither the training nor the experience to enable him to do so reliably. The Tax Court Judge held that while Mr. Fox could give evidence of industry practice, based on his personal experience (A.B. p. 173, l. 8), the relevance of that evidence was open to question given that Mr. Fox had no personal knowledge of operations of the Trustees in this case.

[13] Following this ruling, Mr. Fox gave evidence as to industry practice. He testified that, in the case of publicly traded companies, trustees would value their shares at the prevailing market price. He also testified that the companies whose share values were in issue in these proceedings were publicly traded companies. In cross-examination, Mr. Fox testified that sales on dealer exchanges over the counter trades were not sales on stock exchanges.

[14] In re-examination, Mr. Fox confirmed that there was a publicly accessible record of share sales on dealer exchanges but he was not asked to produce such records or to interpret them.

[15] The Minister called no evidence and moved for a non-suit.

[16] The Tax Court Judge dismissed the appeals. He found that there was no evidence that the shares of Alliance and Otis were qualified investments as a result of being traded on a designated stock exchange, as stipulated in paragraph 204(d) which is incorporated by reference in the definition of qualified investment at paragraph 146(a) of the ITA. In fact, the evidence of Mr. Fox was that dealer exchanges were not stock exchanges.

[17] On the issue of the fair market value of the shares, the Tax Court Judge rejected the Taxpayers' argument based on industry practice. The Court was not prepared to assume that the contribution receipts issued to the Taxpayers reflected the fair market value of the shares at the time they were acquired by the RRSPs. The Tax Court Judge rejected this argument because there was no evidence as to the practices of the Trustees in question. As a result, the Tax Court Judge found that there was no evidence capable of rebutting ("demolishing") the Minister's assumption that the fair market value of the shares was the price paid for them by the Taxpayers.

[18] Before this Court, counsel for the Taxpayers (who was not trial counsel) argues that the Tax Court Judge misunderstood the thrust of the expert evidence to be given by Mr. Fox. Counsel argues that the issue which Mr. Fox's report and his proposed expert evidence addressed was the proper method of assessing the fair market value of shares traded in a public market. Counsel attempted to persuade us that the correct method was to rely on the evidence of market trades and not to rely on any form of analytical valuation such as a business valuation. It appears that the experts retained by

the Minister proceeded on the latter basis. Those reports were not before us since, as noted, the Minister did not call any evidence.

[19] Counsel cited authority in support of the proposition that the fair market value of publicly traded shares, absent special circumstances, is the market price, the price at which the shares trade in the public market: see *Canada v. National System of Baking of Alberta Limited*, [1977] F.C.J. No. 1108 (F.C.A.), [1978] C.T.C. 30, at paragraphs 11-12, *Henderson Estate v. Canada (Minister of National Revenue – MNR),* [1973] F.C.J. No. 800, [1973] C.T.C. 636, at paragraphs 21-22. Counsel argued that Mr. Fox's evidence was intended to show that the Trustees of RRSPs acted in accordance with that line of authority. Unlike counsel at trial, counsel on the appeal did not suggest that, as a result, this court could rely on the value assigned to the shares by the Trustees to determine the fair market value of the shares. His approach, as I understood it, was that Mr. Fox would have been in a position to point to records showing public trades of the shares in question at the values at which they were contributed to the Taxpayers' RRSPs.

[20] As I understand counsel's argument, the Tax Court Judge's ruling that Mr. Fox was not qualified to give evidence as to the valuation of the shares is irrelevant. I agree with the Tax Court Judge that Mr. Fox was not qualified to give expert evidence as to the value of the shares in question, and I agree with counsel that this disqualification was of no consequence. Given the fact that Mr. Fox was allowed to testify as to industry practices in the securities industry as to the manner in which shares in publicly traded companies are valued by trustees of RRSPs, I am also of the view that the Tax Court Judge's refusal to receive Mr. Fox's report into evidence did not prejudice the Taxpayers since Mr. Fox gave his evidence on this point *viva voce*.

[21] However, counsel argues that Mr. Fox's report should have been received in evidence by the Tax Court Judge since it contained other evidence which could have been of assistance to the Court. This argument is difficult to sustain in light of the fact that Mr. Fox testified *viva voce*. He gave evidence as to industry practice which was consistent with what he wrote in his report. However, he was not asked if there was evidence of trading in the shares in question at the material time. He was not asked if that evidence disclosed the price at which the shares sold in those transactions. He was not asked to explain or comment on the business records which were before the Court at the time he gave his evidence. On its face, all of this evidence would have been admissible. Its probative value would have been for the judge to decide but the judge cannot be faulted for not considering evidence which was not put before him.

[22] I might add that the report itself was deeply flawed. The issue before the Court was the fair market value of the shares. Mr. Fox was to be called to testify that the industry practice was to value publicly traded shares at the price at which they traded in the market. Against that backdrop, the report begins with the following assumption:

> In each case, the securities were contributed at a price that was either the last sale in the public markets, or was "at-or-between" the quoted bid and ask of the security.
>
> A.B. p.160

In light of the issue in the appeal, this is begging the question.

[23] As a result, the report's conclusion on fair market value would have been of no use whatsoever to the Court:

> 3. Based on the assumptions and the documents which you have reviewed, were the transactions in question conducted in accordance with industry standards?

> Yes. The securities were swapped to the corresponding RRSP account at a price that reflected the quoted bid/ask of that day and were therefore, swapped at a fair market value price.
>
> A.B. p. 165

[24] Given the assumption on which it was based, the report could hardly conclude otherwise. This reasoning was entirely circular.

[25] As a result, the Tax Court Judge was correct in coming to the conclusion he did on the question of the fair market value of the shares. There was no evidence before him which contradicted or "demolished" the Minister's assumptions as to the fair market value of the shares at the time they were contributed to the Taxpayers' RRSPs. Mr. Fox's *viva voce* evidence did not touch on those questions while his report, even if it had been admitted, would not have been such evidence.

[26] I would therefore dismiss the six appeals with one set of costs.

"J.D. Denis Pelletier"

J.A.

"I agree
Johanne Gauthier"

"I agree
Robert M. Mainville"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-409-11, A-405-11, A-406-11, A-407-11, A-408-11, A-410-11
STYLES OF CAUSE:	Brian Barwill et al v. HMQ
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 30, 2013
REASONS FOR JUDGMENT BY:	Pelletier J.A.
CONCURRED IN BY:	Gauthier J.A Mainville J.A.
DATED:	February 15, 2013

APPEARANCES:

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