Federal Court of Appeal  Cour d'appel fédérale

Date: 20130313

Docket: A-457-11

Citation: 2013 FCA 79

CORAM: **BLAIS C.J.**
EVANS J.A.
STRATAS J.A.

BETWEEN:

MICHAEL OSTROFF

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on March 13, 2013.

Judgment delivered from the Bench at Toronto, Ontario, on March 13, 2013.

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20130313

Docket: A-457-11

Citation: 2013 FCA 79

CORAM: **BLAIS C.J.**
EVANS J.A.
STRATAS J.A.

BETWEEN:

MICHAEL OSTROFF

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on March 13, 2013)

EVANS J.A.

[1] Michael Ostroff is appealing a decision by the Tax Court of Canada (2011 TCC 513) in which Justice Favreau (Judge) dismissed his appeals from the assessments made by the Minister of National Revenue of his income tax liability for the taxation years 2003 to 2008 inclusive (the years in question), and from the imposition of a penalty for failing to file returns for the years in question.

[2] The assessments for all six taxation years were dated May 13, 2010. Mr Ostroff filed three separate appeals in the Tax Court: one for the years 2003 and 2004; one for 2005 and 2006; and one

for 2007 and 2008. The Tax Court heard these appeals on common evidence under the Court's informal procedure.

[3] The Judge held (at para. 17) that Mr Ostroff had provided no evidence to establish a *prima facie* case that the assumptions of fact on which the Minister had based the assessments were wrong, including those regarding his gross income. He further found that, even on Mr Ostroff's estimation of his net income, tax was payable in each of the years in question, and that, accordingly, the Minister had not erred in imposing late filing penalties under subsection 162(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act).

[4] Because Mr Ostroff had not filed returns for the years in question, the Minister had to make "arbitrary" assessments under subsection 152(7) of the Act of the tax payable. The Minister based these assessments on assumptions of fact about the amount of the business income earned by Mr Ostroff in each of the years in question: $56,599 for 2003; $58,700 for 2004; $58,000 for 2005; $58,700 for 2006; $60,300 for 2007; and $60,300 for 2008.

[5] The Minister also assumed that Mr Ostroff had no expenses related to his business in the years in question, but allowed him the basic personal amounts and amounts for Canada Pension Plan contributions in the calculation of non-refundable tax credits. On this basis, the Minister assessed the total amount of tax owing for the years in question as $57,886.54.

[6] Mr Ostroff testified before the Tax Court that he had been employed as a sales representative until 2002 when his employer went out of business; he reported net income of

$46,486 for that year. He further stated that he had received employment insurance benefits in 2002 and 2003, when he started a paralegal business.

[7] Mr Ostroff estimated his net income for the years in question as follows: 2003, $7,000; 2004, $12,000; 2005, $14-15,000; 2006, $18,000; 2007, $18,000; and 2008, $20-21,000. He stated that he had made these estimates after reviewing his bank statements (which he did not adduce at the hearing) and after taking into account a 75% deduction for business expenses. He adduced no evidence of any expenses that he had incurred in those years. On the basis of Mr Ostroff's calculations of his net income (that is, 25% of gross) his gross income exceeded the Minister's assumptions of his income in at least the years 2006, 2007, and 2008: Respondent's memorandum of fact and law, paragraph 16.

[8] Mr Ostroff's principal submission at the hearing in this Court was that the Judge erred in fining that he had not adduced *prima facie* evidence that the Minister's assumptions were wrong. Because this is a question of mixed fact and law, Mr Ostroff must satisfy us that the Judge made a palpable and overriding error in reaching this conclusion: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 234 at paras. 28 and 36.

[9] We are not persuaded that the Judge did so err. Mr Ostroff adduced no evidence: to support his estimates of his income, which he conceded might not be accurate; to indicate that the Minister's assumptions were otherwise wrong; or to show any business-related expense that he had incurred in the years in question.

[10] He argued that the Judge should have allowed as an expense the fee of $3,360, evidenced by an invoice, for which he had been billed by his representative in the Tax Court appeal. However, since this expense was incurred in 2011, that is, outside the years in question, it cannot be taken into account in computing his taxable income in those years.

[11] Mr Ostroff also argued before this Court that the Minister's assumptions of fact were invalid because the Minister had not disclosed the basis on which his income for the years in question had been determined. Mr Ostroff relied on a statement by Justice Desjardins, writing for the Court in *Hsu v. The Queen*, 2001 FCA 240, 202 D.L.R. (4th) 247 at para. 22, to the effect that, while subsection 152(8) deems to be valid an "arbitrary" assessment made under subsection 152(7),

> … the Minister is obliged to disclose the precise basis upon which it has been formulated … [o]therwise, the taxpayer would be unable to discharge his or her initial burden of demolishing the "exact assumptions made by the Minister …".

[12] Without addressing this statement in his reasons, the Judge stated (at para. 16) that, because Mr Ostroff had not produced *prima facie* evidence to show that the Minister's assumptions were wrong, "the Minister was under no obligation to provide information concerning the manner in which the appellant's income was computed."

[13] We need express no opinion in this case on the scope of the Minister's duty, if any, to disclose to a taxpayer the basis of assumptions of fact on which assessments under subsection 152(7) were based.

[14] This is because Mr Ostroff was aware of the basis on which the Minister had determined his business income. In the three Notices of Appeal that he filed to initiate his appeals to the Tax Court, he stated (Appeal Book, pp. 13, 14, and 15) that the "CRA used Statistics Canada Averages improperly as the basis for Assessment". The Minister admitted in the Notices of Reply (Appeal Book, pp. 16, 23, 30) that the "CRA used Statistics Canada Averages to determine the Appellant's business income" for the years in question.

[15] On the basis of the material before us, we are not satisfied that Mr Ostroff's representative in the Tax Court substantiated the allegation that the Minister "improperly" used Statistics Canada Averages. Nor did he introduce Statistics Canada Averages as evidence to rebut the Minister's assumption about the amount of his business income in the years in question.

[16] We would also emphasize that Mr Ostroff filed no returns for the years in question. Moreover, although Mr Ostroff was in the best position to know how much he had earned from his business, and what expenses he had incurred to earn it, he adduced no evidence before the Tax Court to substantiate either the estimates that he made of his income or any business-related expenses incurred in the years in question, or to indicate that the assumptions made by the Minister were otherwise wrong. Further, as we have already noted, even on Mr Ostroff's own estimates, his gross income for at least three of the years in question exceeded the Minister's assumptions.

[17] Since Mr Ostroff did not successfully challenge the Minister's assumptions relating to the amount of income earned in the years in question, tax was payable in each year. He was therefore under a duty to file a return for those years by virtue of subsections 150(1) and (1.1) of the Act.

There is thus no basis for impugning the Judge's decision to confirm the late filing penalties imposed by the Minister.

[18] In all these circumstances, we are persuaded that Mr Ostroff was sufficiently aware of the basis of the Minister's assumptions to give him an effective opportunity to attempt to rebut them, and that in dismissing the appeal the Judge made no error of fact or law warranting our intervention.

[19] For these reasons, the appeal will be dismissed with costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-457-11
APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE RÉAL FAVREAU OF THE TAX COURT OF CANADA DATED NOVEMBER 2, 2011 IN DOCKET NOS. 2011-860(IT)I, 2011-955(IT)I, 2011-1591(IT)I.	
STYLE OF CAUSE:	MICHAEL OSTROFF v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 13, 2013
REASONS FOR JUDGMENT OF THE COURT BY:	(BLAIS C.J., EVANS J.A. AND STRATAS J.A.)
DELIVERED FROM THE BENCH BY:	EVANS J.A.

APPEARANCES:

Michael Ostroff	FOR THE APPELLANT (ON HIS OWN BEHALF)
Sharon Lee	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT