Federal Court of Appeal  Cour d'appel fédérale

Date: 20201008

Docket: A-84-19

Citation: 2020 FCA 168

CORAM: **WEBB J.A.**
LASKIN J.A.
RIVOALEN J.A.

BETWEEN:

RONALD VAN DER STEEN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on September 15, 2020.

Judgment delivered at Ottawa, Ontario, on October 8, 2020.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: LASKIN J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Mr. van der Steen appeals to this Court from a Judgment of the Tax Court (2019 TCC 23) which denied his claim for a charitable donation tax credit in relation to a payment that he made to the Canadian Literacy Enhancement Society (CLES) in 2004. The Tax Court concluded that Mr. van der Steen did not establish that he had the necessary donative intent in relation to this payment.

[2] For the reasons that follow, I would dismiss this appeal.

I. Background

[3] Mr. van der Steen is a lawyer. In 2004, he was practising law as a member of a partnership. In that year, he had approximately $165,000 to $265,000 in his registered retirement savings plan (RRSP). He decided that he wanted to withdraw $100,000 or more from this RRSP.

[4] In attempting to determine how he should complete this withdrawal in a tax-efficient manner, Mr. van der Steen spoke with Steve Reynolds, who was one of the individuals involved in the creation of CLES. Mr. Reynolds advised him to donate to CLES the full amount withdrawn from the RRSP. Since Union Securities Ltd., the holder of the RRSP, deducted an amount for income tax from the payment that was made to Mr. van der Steen, he borrowed money from a bank to replace the funds that were withheld at source. This allowed him to make a payment to CLES that actually exceeded the gross amount that he withdrew from his RRSP.

[5] In paragraph 13 of his reasons, the Tax Court Judge describes Mr. van der Steen's stated intention in making the payment to CLES:

> To make a donation and maximize the return on what I can get in a tax return for removing money from my RRSP.

[6] The position of the Crown in this matter is that prior to making the payment to CLES, Mr. van der Steen was promised a payment (which is referred to as a kickback) for making a payment to CLES. The promise of such additional payment or kickback would mean that Mr. van der Steen did not have the requisite donative intent.

[7] As a result of the particular investments that he held in his RRSP, Mr. van der Steen withdrew the sum of $64,829.52 from his RRSP. Although the Tax Court Judge refers to the amount withdrawn as $64,854.52, this appears to have been the amount that Mr. van der Steen requested (Tab 21 of the Appeal Book). The copy of the T4RSP that is included in the record and the copy of his tax return for 2004 both show that the amount actually withdrawn was $64,829.52. Mr. van der Steen also made a payment to CLES of $65,000 in the same year.

[8] His claim for a charitable donation tax credit based on the payment of $65,000 to CLES was denied and gross negligence penalties were assessed.

II. Tax Court Decision

[9] The Tax Court Judge concluded that Mr. van der Steen had the onus of proving that he had the requisite donative intent when he made the payment to CLES. The Tax Court Judge, as noted in paragraph 61 of his reasons, found that a number of circumstances led him to question whether Mr. van der Steen had established, on a balance of probabilities, that “he intended to impoverish himself to the full extent of $65,000”. One such circumstance, identified in subparagraph 61(a), was the statement by Mr. van der Steen that he had concluded “that it made

no sense to save money in his RRSP for retirement" and this was the reason he chose to withdraw a significant sum in 2004. However, as noted by the Tax Court Judge, in 2007, 2008, 2009, 2012, and 2014 Mr. van der Steen made contributions to his RRSP, including a $29,908 contribution in 2007 and a $21,909 contribution in 2008.

[10] The Tax Court Judge also made observations concerning Mr. van der Steen's testimony in subparagraph 61(b). The Tax Court Judge noted: "Mr. van der Steen seemed too quick in some of his denials".

[11] In subparagraph 61(d), the Tax Court Judge also noted that the $65,000 payment by Mr. van der Steen to CLES in 2004 was not consistent with his prior or subsequent donation history. In paragraph 14 of his reasons, the Tax Court Judge listed Mr. van der Steen's history of amounts given to registered charities for the years from 1987 to 2014. Excluding the amount claimed for 2004, the largest donation that Mr. van der Steen had made in any year was $2,803 in 2003. In all the years from 1987 to 2014 (other than 2004), there were only three years (2002, 2003 and 2005) in which Mr. van der Steen donated more than $2,000 to registered charities. His payment of $65,000 to CLES in 2004 was more than 23 times the total amount that he contributed to all charities in 2003, which was the year in which he made the largest total charitable donations of any of the years listed (excluding 2004).

[12] As a result, the Tax Court Judge concluded in paragraph 62 of his reasons that:

> […] Mr. van der Steen has failed to prove on a balance of probabilities that he did not expect to receive a kickback and that he intended to impoverish himself to the full extent of $65,000.

[13] The Tax Court Judge allowed Mr. van der Steen's appeal from the assessment of the gross negligence penalty and the Crown has not appealed that finding.

III. Issues and Standards of Review

[14] The appellant raised a number of issues in his memorandum:

A. Admissibility of third-party evidence;

B. Minister's assumptions and burden of proof;

C. Donative intent of Mr. van der Steen; and

D. Delay and fairness.

[15] To the extent that these issues relate to any finding of fact or mixed fact and law made by the Tax Court Judge, the standard of review is palpable and overriding error. To the extent that these issues raise any question of law or an extricable question of law from a question of mixed fact and law, the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33).

IV. Analysis

[16] The issues raised by Mr. van der Steen will be addressed in the same order as they are set out in his memorandum of fact and law.

A. *Admissibility of third-party evidence*

[17] Mr. van der Steen argued that the affidavit of Ms. Harvey sworn March 1, 2016, together with the attached exhibits, should not have been admitted into evidence by the Tax Court Judge. Ms. Harvey was a litigation officer with the Canada Revenue Agency. However, Mr. van der Steen did not include this affidavit in his appeal book. Rather, he included a different affidavit of Ms. Harvey sworn January 21, 2016. In any event, the Crown in paragraph 64 of its memorandum, noted: "[t]he affidavit of B. Harvey sworn March 1, 2016 laid out the reassessing history of the appellant, and detailed the additional reassessment levying the gross negligence penalty". As noted above, the assessment of the gross negligence penalty is no longer in dispute as the Tax Court Judge vacated the reassessment levying this penalty and the Crown has not appealed that decision.

[18] Furthermore, Mr. van der Steen, at the hearing of this appeal, stated that he did not object to the contents of the affidavit of March 1, 2016. His only objection is with respect to the timing of the submission of the affidavit. He stated that he did not have time to cross-examine Ms. Harvey prior to the commencement of the Tax Court hearing. He noted that the Tax Court Judge offered to adjourn the hearing to allow him the time to cross-examine Ms. Harvey. However, Mr. van der Steen chose instead to proceed with the hearing without any further delay.

[19] There is no basis for this Court to interfere with the admission of Ms. Harvey's affidavit into evidence.

[20] Mr. van der Steen's other objection to third-party evidence related to witnesses who testified with respect to CLES and promises that had been made to other individuals who made payments to CLES. In particular, Mr. van der Steen objected to the testimony of Mr. Saran, who testified that he had made payments to CLES on the basis that a significant portion of his "donation" would be returned to him.

[21] However, it is clear from paragraph 36 of the reasons of the Tax Court Judge that he did not consider Mr. Saran's testimony to be "relevant or admissible for the purposes of implying or proving that Mr. van der Steen made a payment to CLES in circumstances similar to those of Mr. Saran". As well, the circumstances that the Tax Court Judge did consider relevant (which are set out in paragraph 61 of his reasons) do not include any reference to any of the third-party evidence. The Tax Court Judge only referred to Mr. van der Steen's testimony and his tax records.

[22] There is no basis to interfere with the finding of the Tax Court Judge with respect to the admissibility of the third-party evidence.

B. *Minister's assumptions and burden of proof*

[23] The Tax Court Judge found that Mr. van der Steen had the burden of proving, on a balance of probabilities, that he had the requisite donative intent.

[24] In paragraph 2 of his Amended Notice of Appeal to the Tax Court of Canada filed on March 28, 2014, Mr. van der Steen stated:

> [i]n 2004, the Appellant made a donation to the Canadian Literacy Enhancement Society (hereinafter "CLES") in the amount of $65,000.00 (Sixty Five Thousand Dollars and Zero Cents).

[25] In paragraph 7 of the Reply to the Amended Notice of Appeal filed on April 7, 2014, the Crown denied the allegation of fact in paragraph 2 of the Amended Notice of Appeal.

[26] In *Eisbrenner v. Canada*, 2020 FCA 93, this Court confirmed that a taxpayer who pleads a particular fact in his, her or its notice of appeal to the Tax Court has the onus of proving that fact on a balance of probabilities when the Crown denies that allegation of fact. Mr. van der Steen would know whether he had the necessary donative intent in order for the payment of $65,000 to CLES to qualify as a charitable donation.

[27] The Tax Court Judge did not err in finding that Mr. van der Steen had the onus of proving, on a balance of probabilities, that he had the requisite donative intent.

C. *Donative intent of Mr. van der Steen*

[28] At the hearing of this appeal, Mr. van der Steen continued to insist that his intent in completing these transactions was to put in place a "tax plan" that would allow him to withdraw funds from his RRSP and retain money for his own personal use. His argument is that, essentially, his stated intention should be sufficient to allow him to succeed in this appeal and, therefore, the Tax Court Judge did not give sufficient weight to his stated intention.

[29] As noted by the Tax Court Judge, a taxpayer's statement of his or her intentions is to be examined in light of all of the circumstances. In paragraph 53 of his reasons, the Tax Court Judge referred to the following passage from *Symes v. Canada*, [1993] 4 S.C.R. 695 at page 736, 110 D.L.R. (4th) 470:

> As in other areas of law where purpose or intention behind actions is to be ascertained, it must not be supposed that in responding to this question, courts will be guided only by a taxpayer's statements, *ex post facto* or otherwise, as to the subjective purpose of a particular expenditure. Courts will, instead, look for objective manifestations of purpose, and purpose is ultimately a question of fact to be decided with due regard for all of the circumstances.

[30] In the recent case of *MacDonald v. Canada*, 2020 SCC 6, the Supreme Court of Canada also noted:

> 43 Mr. MacDonald's *ex-post facto* testimony regarding his intentions cannot overwhelm the manifestations of a different purpose objectively ascertainable from the record.

[31] It is clear from the decision of the Tax Court Judge that he was examining Mr. van der Steen's stated intentions in light of the objective evidence that contradicted those stated intentions. The Tax Court Judge found that Mr. van der Steen's mere statement of what he intended was not sufficient, taking into account all the circumstances of the case, to establish that he had the requisite donative intent.

[32] An examination of the tax implications arising from Mr. van der Steen's "tax plan" also supports the conclusion of the Tax Court Judge.

[33] It is Mr. van der Steen's statement that he intended to withdraw the funds in a tax-efficient manner and have some money left for personal use. To accomplish this, he withdrew the gross amount of $64,829.52 from his RRSP and paid $65,000 to CLES. Before taking into account the tax implications, the net amount that he would have from these two transactions is a deficit of $170.48. Therefore, the only money that he would have for any personal expenditures would arise from the difference between the taxes that would be payable as a result of the withdrawal from his RRSP, and the tax credit that would be generated as a result of a charitable donation of $65,000.

[34] Only the federal tax tables for 2004 are included as part of the record. As a result, the tax analysis will first be completed in relation to the net federal income taxes payable. Schedule 1 to his 2004 tax return indicates that for income in excess of $70,000 but not more than $113,804, the federal tax rate was 26%, and for income in excess of $113,804 the applicable federal tax rate was 29%.

[35] Mr. van der Steen's other income for 2004 was $77,305.93 and his deductions in computing his net income were $7,170.31. He had no further deductions in computing his taxable income. Since his total taxable income for 2004 was $134,965.14 (as disclosed in his tax return), his taxable income before adding in the RRSP withdrawal was $70,135.62 ($134,965.14 - $64,829.52).

[36] Therefore, the portion of the $64,829.52 withdrawn from the RRSP that would increase his taxable income from $70,135.62 to $113,804 ($43,668.38), would have been taxed at 26% and the remaining portion ($21,161.14) would have been taxed at 29%:

	Amount	**Tax Rate**	**Federal Income Taxes**
Amount taxed at 26%	$43,668.38	26%	$11,353.78
Amount taxed at 29%	$21,161.14	29%	$6,136.73
Total	$64,829.52		$17,490.51

[37] The total federal taxes that were payable as a result of Mr. van der Steen withdrawing $64,829.52 from his RRSP in 2004 were $17,490.51.

[38] A charitable donation in excess of $200 in 2004 generated a non-refundable tax credit equal to 29% of such donation. Since Mr. van der Steen had other charitable donations in 2004 in excess of $200 that were accepted as valid charitable donations, a donation of $65,000 would have generated a federal non-refundable tax credit of $18,850 ($65,000 x 29%).

[39] The amount that Mr. van der Steen would have had for his personal expenditures after taking into account the federal tax implications would have been:

Amount withdrawn from his RRSP:	$64,829.52
Amount paid to CLES:	($65,000.00)
Federal Taxes Paid on RRSP withdrawal:	($17,490.51)
Federal non-refundable tax credit for a charitable donation of $65,000:	$18,850.00
Net amount:	$1,189.01

[40] While the provincial tax table is not included in the record, I can take judicial notice of the *Income Tax Act*, RSO 1990, c I.2 as it read in 2004. Subsection 4(3) of the Ontario *Income Tax Act* provided, for taxation years ending after December 31, 1999, that the highest tax rate was applicable to taxable income in excess of $60,009. Taxable income was defined in section 1 as meaning taxable income as determined under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). The $60,009 amount for the lower end of the highest tax bracket was adjusted annually, after 1999, based on the consumer price index (section 4.0.2). By 2004, the highest tax rate was applicable to taxable income in excess of $66,752 (based on the forms published by the Canada Revenue Agency).

[41] Subsection 4.0.1(24) of the Ontario *Income Tax Act*, provided that the credit for charitable donations in excess of $200, was equal to the highest tax rate multiplied by the amount of the charitable donation. Since, as discussed above, Mr. van der Steen's taxable income before adding in the RRSP withdrawal was $70,135.62, all of the additional income arising as a result of the withdrawal would have been taxed at the highest tax rate under the Ontario *Income Tax Act*. While the credit for charitable donations would also have been based on the highest tax rate, this credit would simply have offset the additional Ontario provincial income taxes payable as a result of the RRSP withdrawal and Mr. van der Steen would not have retained any additional amount as a result of the Ontario provincial income tax implications. Rather, since the Ontario *Income Tax Act* also included an Ontario Health Premium (sections 2.2 and 3.1) which was based on an individual's taxable income, Mr. van der Steen would have been out of pocket the amount of such additional Ontario Health Premium since the RRSP withdrawal increased his

taxable income but the non-refundable tax credit for a charitable donation did not reduce his taxable income.

[42] Therefore, the only amount that Mr. van der Steen would have retained for his personal use following a withdrawal of $64,829.52 from his RRSP and a charitable donation of $65,000 would have been less than $1,189.01. Since Mr. van der Steen's stated objective was to "maximize the return on what [he could] get in a tax return for removing money from [his] RRSP", it does not seem logical that he would withdraw over $64,000 from his RRSP to retain less than 2% of this amount for his personal use. A promise of an additional sum payable to him would seem to be more consistent with his stated intention of "maximizing his return".

[43] When the issue of the relatively small amount that Mr. van der Steen would retain as a result of the withdrawal from his RRSP followed by a donation to a charity was raised at the hearing of this appeal, the only response provided by Mr. van der Steen was that this type of analysis was not done by him. This is not a sufficient explanation when the amount withdrawn from his RRSP was a significant percentage of the amount held in his RRSP and a significant percentage (over 80%) of his other income for 2004.

[44] It also does not seem logical that Mr. van der Steen would withdraw a significant percentage from his RRSP (ranging from 24% to 39% of his RRSP, based on the estimated range of $165,000 to $265,000 of the value of the assets in his RRSP) and give it to an organization about which he knew very little. There was also no satisfactory explanation of why, if Mr. van

der Steen simply wanted to withdraw money from his RRSP and donate it to a registered charity, he donated it all to this particular charity.

[45] There is no basis to interfere with the Tax Court Judge's finding that Mr. van der Steen failed to establish, on a balance of probabilities, that he had the requisite donative intent in relation to the $65,000 paid to CLES that would allow such payment to qualify as a charitable donation.

D. *Delay and fairness*

[46] Mr. van der Steen has not established any delay or unfairness that warrants our intervention. Mr. van der Steen submits that there was a significant delay from the time when he submitted his notice of objection on May 28, 2008 to the date that the reassessment was confirmed on September 12, 2012. However, Mr. van der Steen did not have to wait until he received the notice of confirmation to file an appeal to the Tax Court. He could have done so after 90 days had elapsed from the date he had served his notice of objection (subsection 169(1) of the Act). Having chosen to wait for a response from the Minister rather than commence an appeal, he cannot now complain about the delay in having the matter heard by the Tax Court.

[47] As noted by this Court in *Main Rehabilitation Co. v. Canada*, 2004 FCA 403:

> 6 In any event, it is also plain and obvious that the Tax Court does not have the jurisdiction to set aside an assessment on the basis of an abuse of process at common law or in breach of section 7 of the *Charter*.
>
> 7 As the Tax Court Judge properly notes in her reasons, although the Tax Court has authority to stay proceedings that are an abuse of its own process (see

> for instance *Yacyshyn v. Canada*, 1999 D.T.C. 5133 (F.C.A.)), Courts have consistently held that the actions of the CCRA cannot be taken into account in an appeal against assessments.
>
> 8 This is because what is in issue in an appeal pursuant to section 169 is the validity of the assessment and not the process by which it is established (see for instance *the Queen v. the Consumers' Gas Company Ltd.* 87 D.T.C. 5008 (F.C.A.) at p. 5012). Put another way, the question is not whether the CCRA officials exercised their powers properly, but whether the amounts assessed can be shown to be properly owing under the Act (*Ludco Enterprises Ltd. v. R.* [1996] 3 C.T.C. 74 (F.C.A.) at p. 84).

[48] It was the validity of the reassessment denying Mr. van der Steen's claim for a non-refundable charitable donation tax credit based on his payment of $65,000 to CLES that was in issue before the Tax Court, not the actions of the Canada Revenue Agency or the Minister. His arguments related to delay and fairness are without merit.

V. Conclusion

[49] I would dismiss the appeal. The parties submitted correspondence after the hearing of the appeal indicating that they had agreed that costs of $2,400 would be payable to the successful party. I would therefore award costs of $2,400 to the respondent.

"Wyman W. Webb"
J.A.

"I agree
J.B. Laskin J.A."

"I agree
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED JANUARY 23, 2019, CITATION NO. 2019 TCC 23 (DOCKET NO. 2012-4731(IT)G)

DOCKET:	A-84-19
STYLE OF CAUSE:	RONALD VAN DER STEEN v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 15, 2020
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	LASKIN J.A. RIVOALEN J.A.
DATED:	OCTOBER 8, 2020

APPEARANCES:

Alec McLennan	FOR THE APPELLANT
Nadine Taylor Pickering	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McLennan & Associates Oakville, Ontario	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT