Federal Court of Appeal | Cour d'appel fédérale

Date: 20220429

Docket: A-293-20

Citation: 2022 FCA 73

CORAM: **GLEASON J.A.**
WOODS J.A.
DAWSON D.J.C.A.

BETWEEN:

ROBERT A BENNETT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on March 31, 2022.

Judgment delivered at Ottawa, Ontario, on April 29, 2022.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: WOODS J.A.
DAWSON D.J.C.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellant appeals from the decision of the Tax Court of Canada (*per* Spiro, J.) rendered from the bench on October 29, 2020 in files 2019-753(GST)I and 2019-1039(IT)G. In that decision, the Tax Court dismissed the appellant's appeals from assessments made under s. 227.1 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA) for unremitted source deductions, related interest and penalties in the total amount of $62,298.56 and under s. 323 of

the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the ETA) for net tax and related interest and penalties in the total amount of $7,504.44.

[2] At the relevant times, the appellant was the owner and sole director of 6th Street Developments Ltd. (6th Street), a construction company that provided framing and forming services to RABB Construction and Environmental Solutions Inc. (RABB), another company owned by the appellant. RABB was in the business of residential home development.

[3] 6th Street failed to remit source deductions and net tax amounts when it and RABB experienced cash flow problems commencing in 2010, due to a non-paying RABB client, who caused several other clients to also default in making payments. To alleviate the cash flow crisis, the appellant sued the defaulting clients and obtained loans from family members, but there was still a shortfall between the amounts so obtained and the companies' debts.

[4] The sole issue before the Tax Court was whether the appellant exercised due diligence within the meaning of ss. 227.1(3) of the ITA and 323(3) of the ETA to prevent 6th Street's failure to remit source deductions and net tax.

[5] The Tax Court found that the appellant had not established that he was duly diligent because he had delegated responsibility for making the required remittances to a bookkeeper, without adequate oversight. The Tax Court noted that the bookkeeper paid creditors, including the Canada Revenue Agency (CRA), via a first-in-first-out or "FIFO" method and that the appellant failed to give any directions regarding the remittances of source deductions and net tax

amounts. The Tax Court also determined that the appellant's efforts to raise funds to pay the corporations' debts, through litigation and obtaining the loans, did not establish due diligence as these steps represented attempts to cure the failures to remit as opposed to preventing their occurrence.

[6] Before us, the appellant raises four arguments. First, he submits that the Tax Court erred in finding that 6th Street used the FIFO method because it had no creditors other than the CRA, as opposed to RABB, which had several creditors. Second, the appellant says the evidence before the Tax Court demonstrated that he had taken steps to ensure timely remittances were made because 6th Street was using a QuickBooks program. Third, the appellant alleges that the Tax Court did not give him sufficient consideration for the memory lapses he experiences due to a brain injury he suffered several years ago. Finally, the appellant submits that his circumstances are like those in *Penate v. The Queen*, 2020 TCC 63 [*Penate*] and *Worrell v. The Queen*, [1998] 4 C.T.C. 2351, 1998 CanLII 288 (TCC) [*Worrell*] and that his appeal should therefore be granted.

[7] As was explained to the appellant during the hearing, our function is not to retry his case or to re-weigh the evidence that was before the Tax Court. Quite the contrary, we can only intervene if we determine that the Tax Court either erred in law or made a palpable and overriding error of fact. The test for setting aside a decision for palpable and overriding factual error is an exacting one. An error is only palpable if it is obvious or plainly seen and only overriding if it affects the result reached. As stated by this Court in *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46:

> [46] Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services* (2006) 217 O.A.C. 269 (C.A.) at paragraphs 158-59; *Waxman*, *supra*. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

[8] All of the appellant's arguments are factual ones. Having carefully reviewed the transcript and the exhibits that were before the Tax Court, I cannot find that it made any palpable and overriding error in concluding that the appellant failed to establish a due diligence defence.

[9] Insofar as concerns the appellant's allegation regarding the inapplicability of the FIFO method to 6th Street, the appellant did not clearly distinguish between how it and RABB paid their creditors in his testimony before the Tax Court and testified more than once that the bookkeeper, who worked for both RABB and 6th Street, used the FIFO method. In addition, he confirmed that 6th Street employees were paid on a bi-weekly basis by cheque and that he had not given any instructions regarding the making of remittances to the CRA. He also testified that he did not become aware of the failure to make the required remittances until 2015, several years after the failures to remit occurred.

[10] As for the use of QuickBooks, nowhere in his testimony did the appellant explain how it might have ensured the required remittances were made in a timely fashion or in priority to other payments.

[11] The Tax Court was well aware of the appellant's brain injury and referred to it in its reasons. Moreover, a review of the transcript shows that Justice Spiro was careful to explain the process, gave the appellant every opportunity to present his case and asked pertinent questions to attempt to elicit relevant evidence from the appellant, who was representing himself. The Tax Court therefore did all that it could to accommodate the memory problems faced by the appellant. The fact remains, though, that the appellant bore the burden of proof to establish that he was duly diligent. His inability to recall pertinent detail cannot discharge that burden.

[12] Based on the evidence tendered before the Tax Court, it was entirely open to it to have concluded that the appellant failed to establish that he acted in a duly diligent fashion to make the required remittances.

[13] As the respondent rightly notes, the facts in this case are distinguishable from those in *Penate* and *Worrell.* In *Penate*, the taxpayer, unlike the appellant, established that she had done everything in her power to prioritize the required remittances, and in *Worrell*, the bank controlled the remittances by dishonouring cheques payable to the Receiver General and calling a loan, which resulted in the company's filing for bankruptcy. These two cases turn on their particular facts, which are very different from those in the appellant's case.

[14] I would therefore dismiss this appeal. In the circumstances, like the Tax Court also did, I would decline to make an award of costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Judith Woods J.A."

"I agree.
Eleanor R. Dawson D.J.C.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-293-20
STYLE OF CAUSE:	ROBERT A BENNETT v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 31, 2022
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	WOODS J.A. DAWSON D.J.C.A.
DATED:	APRIL 29, 2022

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