Federal Court of Appeal | Cour d'appel fédérale

Date: 20221004

Docket: A-36-20

Citation: 2022 FCA 165

CORAM: **RENNIE J.A.**
DE MONTIGNY J.A.
RIVOALEN J.A.

BETWEEN:

PETER BONDE

Appellant

and

HIS MAJESTY THE KING

Respondent

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on October 4, 2022.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The appellant appeals from an order of the Tax Court of Canada (2017-1630(IT)G *per* Ouimet J.) (Oral Reasons) dismissing a motion to strike portions of the respondent's reply to his notice of appeal. The motion arose in the context of an appeal of the Minister's assessment of the appellant's unreported business income.

[2] This was the second of two motions brought by the appellant. Both motions sought to strike statements from the respondent's reply that the appellant contended were conclusions of law or mixed fact and law.

[3] On the first motion, the appellant met with partial success. Ouimet J. ordered that the respondent file a new reply that complied with directions given at the hearing. Throughout the hearing, the judge asked the appellant whether the changes ordered satisfied his concerns; for the most part, he replied that they did. Nevertheless, upon receiving the respondent's new reply, the appellant filed a second motion to strike, which was also heard by Ouimet J. The judge dismissed that motion, giving rise to this appeal.

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

[5] The judge considered the grounds for striking a pleading from Rule 53(1) of the *Tax Court of Canada Rules (General Procedure),* SOR/90-688a (Rules), noting that this is done only in the "most exceptional cases" (*Gramiak v. The Queen,* 2013 TCC 383 at para. 35, aff'd 2015 FCA 40, [2015] D.T.C. 5042). After a thorough review of the pleadings and assessing them against the asserted deficiencies, the judge concluded that the respondent's new reply reflected the directions given at the first motion and that the respondent's position was "clearly and accurately" set forth in the new reply (Oral Reasons at p. 4). In reasons rendered from the bench, the judge stated that the respondent had clearly expressed the facts that the Minister had assumed in the new reply and that the appellant was well-informed of the case he had to meet (Oral Reasons at p. 5).

[6] The crux of the appellant's argument was that the respondent's reply contained conclusions of law or mixed fact and law, contrary to Rule 49 of the Rules. The judge addressed each specific asserted violation of the rule:

1) **"Income"**, **"services"**, **"payment"**, **"business"**, and **"sole operator"**: The judge rejected the argument that the use of these words in the reply represented conclusions of law. To the contrary, he found that these terms were assumptions of fact and that their use was neither scandalous nor an abuse of process. Citing *Xu v. The Queen*, 2006 TCC 695, [2007] 2 C.T.C. 2309 (*Xu*), the judge held that the use of the word **"income"** in pleadings does not represent a conclusion of law, but a claim that evidence exists to show that the funds come within the ambit of the legal meaning of the term. The same reasoning applied to the other four terms.

2) **"Thus"**: The judge found that the respondent's use of the word **"thus"** was not conclusory, as was argued by the appellant. It was an adverb linking one assumed fact to another in a logical way.

3) **"Fail"**: The judge held that the term **"fail"** was not a conclusion of law or mixed fact and law. The respondent was entitled to assume that the appellant had neglected or failed to report his income.

[7] On appeal, the appellant argues that the use of terms defined in the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA) gives them a legal and commercial characterization and establishes them as conclusions of law. I do not agree.

[8] The decision of the Tax Court to dismiss the appellant's motion to strike was discretionary. The appellate standards of review from *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 therefore apply on this appeal (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at para. 79). Accordingly, intervention is justified only in the face of an error of law or a palpable and overriding error on a question of fact or mixed fact and law. I see no such errors.

[9] The judge did not err in finding that the disputed words were neither conclusions of law nor of mixed fact and law. Using ordinary words with ordinary meanings in pleadings is not improper. Use of the term "income" to describe funds from a source does not amount to a conclusion that the funds fall within the legal ambit of the word. That is for the judge to determine after hearing the evidence and argument. Similarly, the words "services" and "business" are factual assumptions, although they may have legal implications (*Teelucksingh v. The Queen*, 2010 TCC 94, [2010] D.T.C. 1085 at para. 11).

[10] The argument that "income" is defined in the ITA and its use in a pleading is consequentially a conclusion of law was correctly rejected by the judge. The Tax Court in *Xu* has held that this argument must fail for three reasons:

> [8] … First, income is not defined in section 248 of the *Act* which is the general definition provision. Second, sections 3, 4, 5 and 9 of the *Act* contain

> some basic rules to determine income from different sources without attempting to define "income". Although section 9 states that income from business or property is the profit therefrom, the courts have held that, subject to the *Act*, income is determined by accounting principles and business practice.
>
> [9] And third, even if income were defined in the *Act*, it is not a conclusion of law to allege that a particular amount from a particular source is income. The person making the allegation is simply claiming that there is or will be evidence to bring the particular amount within the (hypothetical) defined term.

[11] I agree. I would add that any other conclusion would make pleading in the Tax Court a near impossibility.

[12] The judge also found that the respondent was entitled to make the assumption of fact that the appellant had a business. Again, I agree. While facts have legal implications, and some factual assertions may mirror, of necessity, words that are used in the ITA, such statements are nevertheless refutable factual assumptions until determined otherwise by the Tax Court (*Canadian Imperial Bank of Commerce v. Canada*, 2021 FCA 96, 2021 D.T.C. 5059 at para. 65).

[13] The appellant argues that the Tax Court erred in rejecting his argument that the reply lacked the material facts necessary to support the Minister's assumptions related to the appellant's alleged commercial activity.

[14] Whether pleadings contain sufficient material facts is a question for the motions judge, who can assess the pleadings as a whole to "ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair" (*Mancuso v. Canada (National Health and Welfare)*, 2015 FCA 227, 476 N.R. 219 at para. 18). As I noted earlier, the judge found that the reply contained all the factual assumptions upon

which the Minister based her assessment; the new reply described that the appellant had provided concrete finishing services, had provided these services as a business, and had earned payment from these services. The judge found that the Minister's position was "clearly and accurately" set forth. The motions judge is entitled to deference regarding his assessment of the sufficiency of the material facts in the new reply.

[15] Finally, the judge did not err in rejecting the argument that the respondent's new reply was an abuse of process. To the contrary, while the judge stopped short of characterizing the appellant's second motion as vexatious, it would have been open to him to have so concluded.

[16] For the reasons above, I would dismiss this appeal with costs.

"Donald J. Rennie"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-36-20
STYLE OF CAUSE:	PETER BONDE v. HIS MAJESTY THE KING

DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES:

REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. RIVOALEN J.A.
DATED:	OCTOBER 4, 2022

WRITTEN REPRESENTATIONS BY:

Peter Bonde	ON HIS OWN BEHALF
Christa Akey Patrick Cashman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

A. François Daigle Deputy Attorney General of Canada	FOR THE RESPONDENT