

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140207

Docket: A-117-13

Citation: 2014 FCA 36

**CORAM: DAWSON J.A.
STRATAS J.A.
NEAR J.A.**

BETWEEN:

ELIAHU SWIRSKY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on February 4, 2014.

Judgment delivered at Ottawa, Ontario, on February 7, 2014.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**STRATAS J.A.
NEAR J.A.**

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] In three transactions which took place in 1991, 1993 and 1995, the appellant transferred shares of a family-owned corporation to his wife. His wife incurred interest and carrying costs in connection with loans taken out to finance the transactions. Over a period of time, the appellant claimed losses arising from the shares transferred to his wife. The amount of the losses was equal to the interest and carrying charges paid in connection with the loans.

[2] The appellant claimed the losses pursuant to subsection 74.1(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act), which attributes income and losses on property transferred from one spouse to the other back to the transferor spouse.

[3] The Minister of National Revenue reassessed the appellant for his 1996 to 2003 taxation years to disallow his claim for the losses on the basis that the appellant's wife did not use the borrowed money for the purpose of earning income. It followed that there were no losses on the shares that could be attributed back to the appellant.

[4] A judge of the Tax Court of Canada found that the appellant failed to show that his wife had a reasonable expectation of earning income from the shares at the time she acquired them. Because she did not have a reasonable expectation of income when she acquired the shares, she was not entitled to deduct the interest and carrying charges when computing her income from the shares. It followed from this conclusion that the Minister did not err when he disallowed the appellant's claim to the losses (2013 TCC 73).

[5] The Judge went on to deal with two alternate arguments advanced by the Minister. First, the Judge found that subsection 74.5(11) of the Act did not preclude the attribution of the losses on the shares to the appellant. Second, the Judge found that the general anti-avoidance rule (GAAR) found in section 245 of the Act did not apply to the facts before him.

[6] On this appeal, the Minister abandoned her reliance upon subsection 74.5(11) of the Act.

[7] The appellant argues that the Judge erred when he found that the appellant's wife did not have a reasonable expectation of income when she borrowed money to purchase the shares.

Specifically, the appellant asserts that the Judge:

- (i) erred in law by not applying the correct legal principle - the appellant states that the Judge was required to apply an objective standard to the determination of whether the appellant's wife had a reasonable expectation of income when she used borrowed funds to acquire the shares but he did not do so;
- (ii) erred in mixed fact and law when he concluded that there was no expectation of income when the appellant's wife borrowed monies to purchase the shares; and
- (iii) erred in fact by reaching conclusions not supported by the evidence, relying on irrelevant evidence and failing to give adequate weight to evidence given on the appellant's behalf.

With respect to the first asserted error, the parties agree that the Judge applied the correct legal test for determining whether interest is deductible under subparagraph 20(1)(c)(i) of the Act and that the only element of the test at issue on the facts of this case was whether the loan proceeds were used for the purpose of earning non-exempt income from a business or property (see: *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622, at paragraph 28).

[8] In *Ludco Enterprises Ltd. v. Canada*, 2001 SCC 62, [2001] 2 S.C.R. 1082 at paragraphs 54 and 55 the Supreme Court determined that where the purpose or intention behind an action is to be ascertained, a court should objectively determine the purpose, guided by both objective and subjective manifestations of purpose. The appellant asserts that the Judge erred in law by relying inordinately upon the wife's subjective intention and not enough upon objective manifestations of purpose.

[9] I reject that assertion. At paragraph 30 of the Judge's reasons, he wrote that in *Ludco* the Supreme Court held that the test for determining the purpose for interest deductibility was "whether, considering all of the circumstances, the taxpayer had a reasonable expectation of income at the time the investment was made". He went on to note that the Supreme Court found that a taxpayer's subjective intention, while relevant, was not conclusive on the question of purpose. In my view, this recitation of the applicable law is that in *Ludco* and far from over-emphasizing the wife's subjective purpose, the Judge considered and gave weight to a number of objective manifestations of the purpose for which the shares were purchased:

- There was no evidence that the family corporation ever paid dividends prior to 1999 (reasons, paragraph 32).
- Prior to the transactions, the appellant's family was supported by shareholder loans paid by the family corporation. Those loans were later transformed into bonuses paid to the appellant. The bonuses were not related to shareholdings (reasons, paragraph 34).
- In the years immediately after the transactions, family expenses continued to be paid by the family corporation. Such payments were treated as loans to family members, regardless of whether they held shares in the corporation (reasons, paragraph 36).
- The family corporation did not have a dividend policy or plan in place to pay dividends on the shares after their acquisition by the appellant's wife (reasons, paragraph 46).
- The loan transactions were set up so the appellant's wife, as borrower, would never have to pay interest or carrying charges out of her own pocket (reasons, paragraph 44).
- It could be inferred that the appellant's wife had a reasonable expectation of receiving a capital dividend. After 1999, the next dividend was paid in 2003 (reasons, paragraph 47).

[10] In my view, these findings of fact were well-founded in the evidence and adequately support the Judge's conclusion that the shares were not acquired with an objectively reasonable expectation of earning income.

[11] In oral argument, counsel for the appellant argued that the Judge also erred in his application of the test set out in *Ludco* by failing to view the relevant transactions through the lens of the family context, including the fact this was a family business. In my view, the Judge did not err as appellant's counsel argued. Throughout his reasons the Judge was mindful of the nature of the family corporation and the evidence about the family context in which the transactions took place.

[12] In light of my conclusion that the Judge committed no error of law and no palpable and overriding error of fact or mixed fact and law, it is not necessary for me to address the Judge's alternate conclusion about the application of the GAAR and I decline to do so. Accordingly, these reasons should not be taken to endorse the Judge's analysis of this issue, particularly his statement at paragraph 71 of his reasons about the relevant onus of proof.

[13] For these reasons, I would dismiss the appeal with costs.

“Eleanor R. Dawson”

J.A.

“I agree.

David Stratas J.A.”

“I agree.

D.G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-117-13

APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE PARIS OF THE TAX COURT OF CANADA, DATED FEBRUARY 28, 2013, IN DOCKET NO. 2007-3940 (IT) G.

STYLE OF CAUSE: ELIAHU SWIRSKY v. HER MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 4, 2014

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: STRATAS J.A.
NEAR J.A.

DATED: FEBRUARY 7, 2014

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