BETWEEN:

SAM SORBARA .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... } RESPONDENT.

1963
Sep. 5
Sep. 17

Revenue—Practice—Amendment of Notice of Appeal—General Rules and Orders of Exchequer Court 115, 119, 165—Income Tax Act, R.S.C. 1952, c. 148, ss. 46(4), 85 (E) and 99(2)—Withdrawal of admission of fact—Effect on Minister's power to re-assess.

After he had filed a notice of appeal from his assessment of income tax on a profit realized upon the sale of land, the appellant made an application to amend his notice of appeal. The main point was appellant's desire to withdraw an admission of fact which placed the date of the land transaction in July 1955 and substitute therefor an allegation that it took place prior to April 5, 1955, and to argue that he should have been assessed in the taxation year 1955. This was objected to by the Minister on the ground that he would be statute-barred from making a re-assessment for 1955 and also that the appellant had to satisfy the Court that the admission was inadvertently made and was not correct.

1963

SAM SORBARA v. MINISTER OF NATIONAL REVENUE

Held: That the application be granted and the amendment allowed; the Minister is entitled to costs in the cause in any event of the cause.

2. That the Minister would not be prevented from re-assessing for 1955 taxation year if the profit should be found to have been earned in that year because the error in date, if an error should be found to have been made, would amount to a "misrepresentation" which would render the four-year limitation in s. 46 of the Act inapplicable.

3. That the Minister would not suffer permanent injury in the granting of the application and could be adequately compensated by costs.

4. That the proposed amendment did not result from an attempt to gain a dishonest advantage.

5. That the appellant's affidavit, not contested by cross-examination under Rule 165, was sufficient proof of inadvertent error and that the admission was not correct.

6. That under the Exchequer Court Rules and principles established by the Courts, amendments should be allowed if they are necessary for the purpose of determining the real question or questions in controversy between the parties and do not cause an irremediable injustice to the other party.

APPLICATION for leave to amend a Notice of Appeal.

The application was made before the Honourable Mr. Justice Noël in Chambers at Ottawa.

P. N. Thorsteinsson for the motion.

N. A. Chalmers contra.

NOËL J. now (September 17, 1963) delivered the following judgment:

This is an application made by the appellant to amend his Notice of Appeal by deleting paragraph 9 of Part A and paragraph 6 of Part B of the said Notice and substituting a new paragraph 9 and 6 as follows:

The loss of this area necessitated complete redesign of the subdivision and after review by the Crown and Bel-Air Builders Company, this proved to be impossible. Consequently negotiations were entered into between Bel-Air Builders Company and the Crown in 1954 and in the early part of 1955 which resulted in the Crown agreeing to pay seven hundred and twenty-five thousand dollars ($725,000) for the purchase of the lands owned by Bel-Air Builders Company. The Purchase Agreement was made in March of 1955 and the formal document giving effect thereto which was prepared by the Crown was signed by the parties at a subsequent date. This purchase by the Crown effectively terminated the business of Bel-Air Builders Company.

That in the alternative if the said gain is found to have arisen from the sale inventory in the form of land belonging to Bel-Air Builders Company, then no part of such gain could have constituted taxable income in the hands of the Appellant, because it resulted from a slump transaction.

1963

SAM SORBARA v. MINISTER OF NATIONAL REVENUE

Noël J.

and by adding a new paragraph 7 to Part B of the said Notice of Appeal which reads as follows:

That the sale of the residue of the land belonging to Bel-Air Builders Company to the Crown took place before Section 85E of the Income Tax Act came into effect.

In support of this application an affidavit was filed by James Andrews Grant, a member of the firm of Stikeman & Elliott, counsel for the appellant, stating in substance that subsequent to the service and filing of the Notice of Appeal and the reply, correspondence bearing upon the matters in issue came to the knowledge of counsel for the appellant and that the amendments here sought are for the purpose of raising an alternative argument in support of the appellant's position herein and are based upon the above documents.

These amendments, if permitted, will allegedly allow the appellant to introduce proof in the form of the recently discovered correspondence establishing that the transaction giving rise to the profits upon which the tax in dispute has been assessed is a "slump transaction" i.e. one where all the assets of the appellant's distinct business were sold and that all the proceeds of such sale were capital in his hands, which transaction did not take place in July of 1955 as formerly alleged in paragraph 9 of the Notice of Appeal, but took place prior to April 5, 1955, date upon which s. 85E of the *Income Tax Act* was made applicable in respect of sales made after April 5, 1955, and from which date slump sales were no longer exempt from taxation.

The appellant for these amendments relies on Rules 115 and 119 of the General Rules and Orders of the Exchequer Court of Canada which read as follows:

The Court or a Judge may at any state of the proceedings allow either party to amend his pleadings, and all such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties.

In addition to the foregoing powers of amendment, at any time during the progress of any action, suit or other proceeding, the Court or a Judge may, upon the application of any of the parties, and whether the necessity of the required amendment shall or shall not be occasioned by the error, act, default, or neglect of the party applying to amend, or without any such application, make all such amendments as may be deemed necessary.

The appellant urges that although the beginning of Rule 115 appears to be permissive, the latter part seems to

1963

SAM SORBARA v. MINISTER OF NATIONAL REVENUE

Noël J.

be mandatory, as it would appear that any amendment "necessary for the purpose of determining the real question or questions in controversy between the parties", should be allowed.

Counsel for the respondent on the other hand objects to the present application for several reasons. Firstly on the basis that if the amendments sought for are permitted, it may be open to the appellant to argue that the Minister has assessed the profits arising from this transaction in the wrong year and that the assessment here should be for the year 1955 and not for the taxation year 1956; consequently, it would be statute-barred by the four year limitation provisions of s. 46 of the *Income Tax Act* from assessing the profit in the earlier year, the original assessment of the appellant's income for 1955 having been mailed on May 9, 1958.

He further urges that we are not only concerned with an amendment but also with the withdrawal of an admission which was contained in paragraph 9 of Part A of the Notice of Appeal consisting in the statement that negotiations between Bel-Air Builders and the Crown were entered into July 8, 1955, which date the appellant would like to replace by 1954 and the early part of 1955 as contained in the new proposed paragraph 9 of Part A.

According to the respondent, the withdrawal of such an admission of fact cannot now be done on the basis that before an admission of fact in a pleading can be withdrawn, the party seeking to withdraw it must satisfy the Court that the admission was inadvertently made and was not correct. He referred to the case of *Chechik v. Bronfman*[1] where, at p. 517, Martin J.A. stated:

> That the appellant here had not satisfied the onus which is upon him of showing that the admission in the Notice of Appeal was inadvertently made and was not correct. That the affidavit supporting the application is not sufficient evidence to establish that the original admission was not correct.

Before dealing with the two main grounds raised by the respondent herein, I would like to say that under Rule 2 of the Exchequer Court Rules, reference must be made to the practice and procedure in force in similar suits, actions and matters in Her Majesty's Supreme Court of Judicature in England. The practice in England with respect to amend-

[1] (1923-4) 18 Sask L R 512

ments would appear to be very similar to the practice before this Court. Indeed, the principle with regard to amendments has been settled in England as well as in this country for many years and can be found in the following decisions: *Stewart v. Metropolitan Tramways*[1]; *Williams v. Leonard et al.*[2] as follows:

> The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but if the amendment will put them into such a position that they must be injured, it ought not to be made.

In the case of *Stewart v. Metropolitan Tramways* referred to above, Pollock J. stated at p. 180:

> The test as to whether the amendment should be allowed, is whether or not the defendant can amend, without placing the plaintiff in such a position that he cannot be recouped as it were, by any allowance of costs or otherwise. Here the action would be wholly displaced by the proposed amendment and I think it ought not to be allowed.

In 25 Halsbury's Law of England, 2nd ed. 1937, at p. 256 *et seq.*, s. 425 reads as follows:

> If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend is granted if the amendment can be made without injustice to the other side. There is no injustice if the other side can be compensated by an order as to costs; but if owing to the way in which the pleading has been framed the other party has been put into such a position that an injury would be done to him by an amendment, the Court will not give leave.

It therefore appears that under the rules governing this Court, and bearing in mind the accepted practice with respect to amendments, the latter should be allowed if they are necessary for the purpose of determining the real question or questions in controversy between the parties and do not cause an irremediable injustice to the other party although it may cause the latter considerable inconvenience which, of course, can be compensated by costs.

I might also add that the proposed amendments must not enable a litigant to obtain a dishonest advantage.

Although the original assessment of the appellant's income for the year 1955 was made on May 9, 1958, and consequently the four year limitation provisions of s. 46 of the said act have elapsed, I believe the Minister could

[1] (1886) 16 Q.B.D. 178.
[2] (1895) 16 Ont. P.R. 544; (1896) 26 Can. S.C.R. 406.

1963

SAM SORBARA
v.
MINISTER OF NATIONAL REVENUE

Noel J

still re-assess the appellant even at this late date on the basis that the appellant has made a misrepresentation with respect to the date of the transaction which, under s. 46(4)(*a*)(1) would prevent the four year limitation provisions from operating. This misrepresentation appears to be particularly so in view of counsel for the appellant's statement in his memorandum dated September 9, 1963, where he admits on behalf of his client that there was such a misrepresentation. The respondent would, therefore, suffer no permanent injury and could be adequately compensated by an award of costs. I am also satisfied that the proposed amendments do not result from an attempt to obtain a dishonest advantage.

With respect to respondent's second point, i.e. the inadequacy of evidence that the admissions were inadvertently made and not correct, the affidavit produced by the appellant herein appears to be sufficient in this regard, the deponent of the affidavit not having been cross-examined as he could have been under s. 165 of the Rules of this Court. May I also add that his argument in this regard is considerably weakened by the fact that in paragraph 9 of his reply, by a general denegation he denies the very admission that the appellant wishes now to withdraw.

I therefore consider that this is a case where the amended pleadings should be allowed and the application is therefore granted with costs in the cause to the respondent in any event of the cause.

Judgment accordingly.