Federal Court of Appeal

CANADA

Cour d'appel fédérale

Date: 20091026

Docket: A-466-08

Citation: 2009 FCA 311

CORAM: **BLAIS C.J.**
NADON J.A.
EVANS J.A.

BETWEEN:

MARK BESNER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on October 26, 2009.

Judgment delivered from the Bench at Vancouver, British Columbia, on October 26, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

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REASONS FOR JUDGMENT OF THE COURT
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EVANS J.A.

[1] This is an appeal by Mark Besner from a decision of the Tax Court of Canada in which Justice V.A. Miller dismissed his appeal from notices of reassessment for the taxation years 2000 and 2001: *Besner v. The Queen*, 2008 TCC 404.

[2] On January 6, 2005, the Minister reassessed Mr Besner by adding unreported income and imposing gross negligence penalties pursuant to subsection 163(2) of the *Income Tax Act*, R.S.C. 1985 c. 1 (5th Supp.) ("*ITA*") for failing to report it. On February 9, 2005, an information was laid

before the Provincial Court of British Columbia charging him with the evasion of income tax and the remittance of Goods and Services Tax. He pleaded guilty to certain offences and, on the basis of an agreed statement of facts and joint submission, the judge imposed a fine and sentenced him to one year of house arrest.

[3] The penalties and the criminal conviction arose from the same statutory infractions. The principal ground of Mr Besner's appeal is that the Minister wrongly reassessed him for penalties because the reassessment occurred after the complaint was made that led to the criminal conviction. He relies on subsection 239(3) of the *ITA*, which provides as follows:

> (3) Where a person is convicted under this section, the person is not liable to pay a penalty imposed under section 162, 163 or 163.2 for the same contravention unless the penalty is assessed before the information or complaint giving rise to the conviction was laid or made.
>
> (3) La personne déclarée coupable d'infraction au présent article n'est passible d'une pénalité prévue aux articles 162, 163 ou 163.2 pour la même infraction que si une cotisation pour cette pénalité est établie à son égard avant que la dénonciation ou la plainte qui a donné lieu à la déclaration de culpabilité ait été déposée ou faite.

[4] Counsel for Mr Besner says that "complaint" in this provision refers to the crystallization of an adversarial relationship between the Canada Revenue Agency ("CRA") and the taxpayer. In this case, counsel argued, crystallization occurred when Mr Besner's file was transferred from the audit division to the investigation division of the CRA on September 16, 2003, or when the matter was accepted for full investigation on November 24, 2003. Both events were well before penalties were imposed on him in the reassessment of January 6, 2005.

[5] The Tax Court Judge rejected this argument, holding that the information was laid on February 9, 2005, after the reassessment, and there never was a complaint. After considering the statutory context and purpose of the provision, she interpreted the words “information or complaint” in subsection 239(3) as having their historical or technical legal meaning of documents that institute criminal or civil proceedings before a court.

[6] We are all of the opinion that, for substantially the reasons that she gave, the Judge was correct in her conclusion.

[7] Counsel for Mr Besner is right to point out that, since proceedings under section 239 are all criminal in nature, they could not be instituted by a complaint in its original meaning. However, that the words “information or complaint” refer in this context to the initiation of criminal proceedings before a court is evident from the use of the same words in section 244, where they clearly have this meaning.

[8] Nor are we persuaded that *R. v. Jarvis*, 2002 SCC 73, [2002] 2 S.C.R. 757, dealing with the point when an income tax audit becomes an investigation for the purpose of attracting the protection of sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*, has any bearing on the very different issue in the present case. Further, since penalties imposed under subsection 163(2) are not penal in nature, no issue of double jeopardy arises under section 11 of the Charter.

[9] For these reasons, the appeal will be dismissed with costs.

"John M. Evans"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-466-08
(APPEAL FROM A JUDGMENT OF MADAM JUSTICE V.A. MILLER OF THE TAX COURT OF CANADA DATED MAY 28, 2008, DOCKET NO. 2007-764(IT)G)	
STYLE OF CAUSE:	Mark Besner v. Her Majesty the Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	October 26, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	(BLAIS C.J., NADON, EVANS JJ.A.)
DELIVERED FROM THE BENCH BY:	EVANS J.A.

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