Federal Court of Appeal

Cour d'appel fédérale

Date: 20240426

Docket: A-313-23

Citation: 2024 FCA 82

CORAM: **STRATAS J.A.**
MONAGHAN J.A.
BIRINGER J.A.

BETWEEN:

LORENCE HUD

Appellant

and

HIS MAJESTY THE KING

Respondent

Dealt with in writing without appearance of parties

Order delivered at Ottawa, Ontario, on April 26, 2024.

REASONS FOR ORDER BY: MONAGHAN J.A.

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REASONS FOR ORDER

MONAGHAN J.A.

[1] The appellant, Lorence Hud, appeals a judgment of the Tax Court of Canada issued on October 27, 2023 in Tax Court File 2023-745(IT)I, for oral reasons delivered on October 24, 2023. The Tax Court dismissed the appellant's appeal of the Minister of National Revenue's assessments of his 2017, 2018, and 2019 taxation years.

[2] The respondent has brought a motion to have the appeal summarily dismissed on the basis that it is bound to fail. Having regard to the notice of appeal, says the respondent, the true nature of the appellant's appeal before the Tax Court, and again before this Court, is not to challenge the correctness of the assessments. Rather, says the respondent, the appellant seeks to re-litigate disputes with other provincial and federal government actors, and seeks relief that neither the Tax Court, nor this Court on appeal, has jurisdiction to grant.

[3] Alternatively, the respondent seeks an order that the appellant file an amended notice of appeal that raises only issues within this Court's jurisdiction and provides a clear and concise statement of appropriate and permitted grounds of appeal.

[4] For the reasons that follow, I would grant the respondent's motion and dismiss the appeal.

I. Background

[5] The appeal before the Tax Court concerned assessments of the appellant's 2017, 2018 and 2019 taxation years. (In paragraphs 42 to 46 below, I address the appellant's allegation that he appealed his 2012-2023 taxation years.) The Minister issued those assessments in 2022 after the appellant failed to file tax returns following the Minister's written requests that he do so. The Minister assumed that the appellant's income in those years was comprised of old age security pension, Canada Pension Plan pension, and interest income. The Minister also assessed penalties for failure to file the returns.

[6] Following his notice of objection, the appellant appealed the assessments under the Tax Court's informal procedure under section 18 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2.

[7] Before the Tax Court, the appellant's principal allegation was that he was unable to file his tax returns for 2017 to 2019, despite the Minister's request, because in 2017 his home, containing his tax records, was seized in connection with unrelated matters. He also argued that he should have been entitled to deductions, in particular depreciation, which would have resulted in less taxable income than was assessed.

[8] The transcript of the proceedings before the Tax Court establishes that the appellant agreed that he had received income of the nature the Minister assessed, although he claimed some uncertainty regarding amounts. The appellant also conceded that he had not filed returns for 2017, 2018, and 2019.

[9] The transcript also establishes that, when asked about the relevant depreciation (*i.e.*, capital cost allowance for tax purposes), the appellant said it related to music equipment he had purchased many years earlier. He explained he had a balance carry forward to deduct until at least 2027.

[10] Other than his oral testimony, the appellant led no evidence to refute the Minister's assumptions that, in each of 2017 to 2019, he earned income in the amounts the Minister assessed. The Tax Court found that, while the appellant "alluded to his entitlement to a

depreciation expense, [he] has not provided the [Tax] Court with any cogent evidence to challenge the Minister's assumptions". The Tax Court pointed out that information about depreciation balances should have been in the returns he filed before 2017.

[11] Relying on the Minister's assumptions and the appellant's concessions, the Tax Court concluded that the assessments were valid and dismissed the appeals. It refused to address any of the other claims advanced by the appellant, stating that it did not have the jurisdiction to do so.

[12] The appellant has appealed that decision to this Court.

II. Analysis

A. *Can this Court Summarily Dismiss an Appeal?*

[13] This Court may summarily dismiss an appeal, either upon motion from a respondent or on its own initiative, where the appeal is "doomed to fail owing to a fatal flaw or the absence of any merit": *Bernard v. Canada (Attorney General)*, 2019 FCA 236 at para.10.

[14] This Court's power to do so stems from its plenary jurisdiction, including the powers necessary for its effective functioning and to manage its own proceedings: *Dugré v. Canada (Attorney General)*, 2021 FCA 8 at paras. 20-22. Keeping appeals that are doomed to fail on the roll, "waste judicial resources and impair access to justice for those who have a meritorious case": *Dugré* at para. 22, citing *Hébert v. Wenham*, 2020 FCA 186 at para. 8 and *Fabrikant v. Canada*, 2018 FCA 224 at para. 25.

B. *Is the Appeal Doomed to Fail?*

[15] The Tax Court decision under appeal, broadly speaking, did two things. It dismissed the appellant's appeal of the assessments and it refused to grant or address other relief the appellant sought from the Tax Court. I will address each of these aspects of the Tax Court decision in turn.

[16] However, it is important to bear in mind what is necessary for the appellant to succeed in this appeal. Given the applicable standard of review—the appellate standard—to succeed on this appeal the appellant must establish that the Tax Court made a palpable and overriding error in determining an issue of fact or mixed fact and law, or erred in law: *Housen v. Nikolaisen*, 2002 SCC 33. A "palpable" error is one that is obvious; an "overriding error" is an error that goes to the core of—in other words would affect—the outcome: *Benhaim v. St-Germain*, 2016 SCC 48 at para. 38, citing *South Yukon Forest Corp. v. R.*, 2012 FCA 165 at para. 46.

[17] Moreover, as the respondent submits, subsection 27(1.3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, restricts the grounds that may be raised in an appeal from a judgment made under the Tax Court's informal procedure. Any erroneous finding of fact must have been made in a perverse or capricious manner or without regard to the material before it.

[18] While I acknowledge that the appellant's notice of appeal purports to rely on the grounds permitted by subsection 27(1.3), I am satisfied that the appeal has no prospect of success. The Tax Court does not have jurisdiction to grant much of the relief the appellant requested and neither do we. In neither his notice of appeal nor his motion record, does the appellant identify a

ground for appeal that meets the requirements of subsection 27(1.3) that has any prospect of success.

(1) The Appellant's Request for Certain Relief Was Beyond the Tax Court's Jurisdiction

[19] Most of the errors that the appellant alleges the Tax Court made have nothing to do with the correctness of the assessments, or the Tax Court's decision to dismiss the appeal of those assessments. Rather, with few exceptions (discussed below), the appellant's grounds of appeal relate to disputes with other government actors or public or quasi-public authorities—the municipality, the police, Municipal Property Assessment Corporation, and Ontario's Chief Firearms Officer—or to disagreements with decisions of other courts or regulatory bodies—the Ontario Court of Justice, the Ontario Superior Court of Justice, the Ontario Divisional Court, and the Law Society of Ontario.

[20] Consistent with this, as he did before the Tax Court, the appellant seeks an order that seized property be restored to him, declarations that actions taken by the municipality are void, and declarations that provisions of particular Ontario statutes and federal statutes are inconsistent with the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11. He asserts that the Tax Court erred in not granting these orders and declarations when he was before it on his appeal.

[21] The Tax Court and this Court do not have jurisdiction to grant that relief. The Tax Court's jurisdiction is defined by statute, in particular section 12 of the *Tax Court of Canada Act*,

and is limited: *Bonnybrook Park Industrial Development Co. Ltd. v. Canada (National Revenue)*, 2018 FCA 136 at para. 19.

[22] The Tax Court has exclusive original jurisdiction to hear and determine appeals on matters arising under a number of statutes, including the *Income Tax Act,* R.S.C. 1985 (5th Supp.), c. 1, to the extent the particular statute provides: *Tax Court of Canada Act*, s. 12(1).

[23] When deciding an appeal from an assessment, the Tax Court is limited to vacating or varying the assessment or referring it back to the Minister for reconsideration and reassessment: *Income Tax Act*, s. 171(1). Neither the *Tax Court of Canada Act* nor the *Income Tax Act* gives the Tax Court jurisdiction to grant the relief the appellant says it erred in not granting.

[24] On appeal of the Tax Court's decision, this Court's powers are limited to dismissing the appeal, referring the matter back to the Tax Court, or giving the decision that the Tax Court should have given: *Federal Courts Act*, s. 52(c). Because the Tax Court could not give the relief the appellant sought when he was before it, it cannot give it were we to refer the matter back. Nor can we give it on appeal.

(2) The Appellant's Allegations Relating to the Tax Court's Decision on the Appeal of the Assessments are Doomed to Fail

[25] I turn now to the portions of the appellant's notice of appeal that allege errors by the Tax Court that might be viewed as relating to the assessments that were before it. These are found in

paragraphs 7, 8, 9, and 10 of the appellant's notice of appeal, but also are repeated and expanded upon elsewhere in it.

[26] The first is that the Tax Court erred in law by assuming that the appellant's income and taxable income are the same. The second is that the Tax Court acted in a perverse or capricious manner, or without regard to the material before it, by suggesting the appellant was able to file a tax return. Finally, the appellant asserts that the Tax Court erred in law in ordering him to file tax returns without his tax records.

[27] Before I address these alleged errors, an explanation about the role of the Minister's assumptions may be helpful.

[28] When assessing a taxpayer, the Minister makes certain assumptions. The Minister's assumptions underlying the assessment must be described in the reply to the appellant's notice of appeal in the Tax Court: *Tax Court of Canada Rules (Informal Procedure)*, SOR/90-688b, s. 6(1)(d). To succeed before the Tax Court, a taxpayer has the onus of demolishing those assumptions (*Lacroix v. Canada,* 2008 FCA 241 at para. 18; *Hickman* Motors *Ltd. v. Canada*, [1997] 2 S.C.R. 336, 148 D.L.R. (4th) 1 at paras. 92-93), or establishing that, even if true, they do not support the assessment under appeal.

[29] To demolish the assumptions, the taxpayer must convince the Tax Court, on a balance of probabilities, that the assumptions are incorrect, typically by leading relevant, credible evidence that does so. If the Tax Court is not convinced that the Minister's assumptions of fact are

incorrect, it is obliged to treat those assumptions as true: *Pollock v. R.* (1993), 161 N.R. 232, 94 D.T.C 6050 (F.C.A.) at para. 21.

[30] Here, in the absence of returns from the appellant, the Minister made assumptions about the amount of income he earned based on information obtained from other sources. The Minister also assumed the appellant had not filed tax returns for 2017, 2018 and 2019. The Minister assessed tax on that income and late filing penalties.

[31] With that context, I return to the three errors alleged by the appellant.

[32] I cannot agree that the Tax Court assumed the appellant's taxable income was the same as income. (Here, I understand the appellant to mean "net income" and "gross income", respectively, because the only deduction he raised before the Tax Court was depreciation—capital cost allowance in tax terms—which is a deduction in computing income, not taxable income.) Rather, the effect of the Minister's assumptions is that the Minister assumed that the appellant's income and net income were the same. Put another way, the Minister assumed the appellant had income from three sources in amounts specified. The Minister computed the appellant's liability for taxes on the basis that those amounts constituted his only income and that he had no depreciation deduction.

[33] Before the Tax Court, the appellant conceded that he received income of the nature assessed. Although he was not certain the amounts were correct, he led no evidence to dispute them. While he asserted an entitlement to depreciation, the Tax Court described that evidence as

not “cogent”. In other words, based on the totality of the evidence, the Tax Court was not persuaded, on a balance of probabilities, that the Minister’s assumptions or the assessments concerning his income were incorrect.

[34] If the appellant believed the income amounts were incorrect, that he had a balance entitling him to capital cost allowance, or that other assumptions of fact underlying the assessments were wrong, the time to lead evidence to establish that was before the Tax Court. An appeal based on this first alleged error has no prospect of success.

[35] I turn now to the second alleged error—that the Tax Court acted without regard to the material before it in determining that the appellant could file a tax return. I first observe that the appellant admitted that he did not file tax returns for 2017, 2018 or 2019 and that the Minister had asked him to file them.

[36] As described above, the appellant’s principal argument was that because his property had been illegally seized by the municipality, he did not have access to his records or information, and thus could not complete his tax returns. He asserted that these acts deprived him of *his right to file* a tax return.

[37] The Tax Court did not agree.

[38] When asked why he could not seek the necessary information from other sources (including his former accountant(s), the payers of the income, or his earlier returns), the transcript makes clear the appellant did not have a satisfactory response. However, even if the Tax Court accepted all of the appellant's allegations about other actors as true, that would not permit it to allow his appeal and vacate the assessments.

[39] Where an assessment of income tax is appealed to the Tax Court, the only issue before the Tax Court is the validity of the assessment based on the relevant provisions of the *Income Tax Act*: *Main Rehabilitation Co. v. Canada*, 2004 FCA 403 at para. 8; *Ereiser v. Canada*, 2013 FCA 20 at para. 31. It is "clear that the Tax Court of Canada does not have the jurisdiction to cancel an established assessment based on improper conduct by the Minister" (*Robertson v. Canada*, 2017 FCA 168 at para. 59) or any other government representative, even if that conduct is proven and might be viewed as "reprehensible conduct…such as abuse of power or unfairness": *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250 at para. 83, and cases there cited.

[40] Thus, an appeal based on the Tax Court's failure to take into account the appellant's allegations regarding the seizure of his property has no prospect of success.

[41] The third alleged error is that the Tax Court ordered the appellant to file returns for the 2020, 2021, and 2022 taxation years. While in the course of its oral reasons, the Tax Court urged the appellant to file those returns, it did not order him to do so. The Tax Court's clear motivation was to warn the appellant that failure to file them could result in further assessments of penalties

for failure to file. Importantly, the Tax Court's judgment does not order the appellant to file tax returns; it only dismisses "the appeal from the assessment made under the Income Tax Act for the 2017, 2018 and 2019 taxation years…without costs." An appeal alleging the Tax Court erred in making an order it did not make has no prospect of success.

C. *Did the Tax Court's Judgment Address the Relevant Taxation Years?*

[42] I must address one final point. The appellant's notice of appeal filed with the Tax Court purported to appeal his 2012 to 2023 taxation years. However, the Tax Court judgment clearly only addresses assessments of the 2017, 2018 and 2019 taxation years. While the appellant claims this was an error, he cannot appeal assessments of taxation years to the Tax Court simply by listing them on his notice of appeal.

[43] An assessment may be appealed to the Tax Court only after a notice of objection to that assessment has been filed with the Canada Revenue Agency: *Income Tax Act*, s. 169(1). Moreover, the time within which an objection may be filed is limited: *Income Tax Act*, ss. 165, 166.1(1), 166.2(1).

[44] I have carefully read the transcript of the proceeding before the Tax Court, the notice of appeal filed in the Tax Court, and the Minister's reply to that notice of appeal. I am satisfied that the only taxation years properly before the Tax Court were the 2017, 2018 and 2019 taxation years. Obviously, his 2022 and 2023 assessment could not be before the Tax Court given he filed his notice of appeal on April 6, 2023.

[45] However, even if the other taxation years referred to in his notice of appeal were properly before the Tax Court, the Tax Court's judgment only dismisses the appeals of the 2017, 2018 and 2019 assessments. Had they properly been before the Tax Court, nothing in the decision under appeal suggests they are not still before it.

[46] Thus, an appeal based on the Tax Court's failure to address any other taxation years has no prospect of success.

III. Conclusion

[47] I have read the transcript and the notice of appeal filed in the Tax Court. As the respondent puts it, "[a] holistic and practical reading of the Notice of Appeal reveals the Appellant [did] not challenge the correctness of the assessment at issue": Respondent's Written Representations at para. 10.

[48] Rather, the focus of the appellant's complaint before the Tax Court was the actions of others—that he was prevented from filing his returns because his property had been seized. The substance of what he sought from the Tax Court is various orders and declarations that it cannot give, and so we cannot give on appeal.

[49] To conclude, I am satisfied that this appeal has no prospect of success. I am also satisfied that no amendments to the notice of appeal could lead to a different result. Accordingly, I would grant the respondent's motion and dismiss the appeal with costs.

"K.A. Siobhan Monaghan"
J.A.

"I agree.
David Stratas"

"I agree.
Monica Biringer"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-313-23
STYLE OF CAUSE:	LORENCE HUD V. HIS MAJESTY THE KING

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	MONAGHAN J.A.
DATED:	APRIL 26, 2024

WRITTEN REPRESENTATIONS BY:

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