Citiation: 2016 TCC 99

2013-700(IT)G

BETWEEN:

HAROLD JAMES MORRISON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

TRANSCRIPT OF
REASONS FOR JUDGMENT

Let the attached certified transcript of my Reasons for Judgment delivered orally from the Bench at Toronto, Ontario. on November 27, 2015, be filed with very minor corrections.

"D.W. Rowe"
Rowe D.J.

Signed at Sidney, British Columbia, on April 15, 2016.

Court File No. 2013-700(IT)G

TAX COURT OF CANADA

BETWEEN:

HAROLD JAMES MORRISON

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

TRANSCRIPT OF ORAL REASONS
HEARD BEFORE THE HONOURABLE JUSTICE ROWE
Federal Judicial Centre,
180 Queen Street West, Toronto, Ontario,
on Friday, November 27, 2015 at 11:23 a.m.

APPEARANCES:

Jeffrey Radnoff	for the Appellant
Katie Beahen	for the Respondent

Also Present:

Carol Forde	Court Registrar
Miriam Claerhout	Court Reporter

900
Ottawa, Ontario K2P 1L5 Toronto, Ontario M5H 2T4
(613) 564-2727 (416) 861-8720

Toronto, Ontario

ORAL REASONS FOR DECISION:

JUSTICE ROWE: All right. As a consequence of my dialogue with counsel and the reference to the appropriate jurisprudence, I am going to point out that with respect to this particular matter, the Minister assessed a gross negligence penalty with respect to the Appellant's 2008 taxation year. I have canvassed the evidence in the course of my dialogue, particularly with counsel for the Respondent.

I will say that I find the evidence of Mr. Morrison to be credible. He was not an individual who, like many of these cases, was at the outset participating in a scheme which was manifestly foolish. He was advised by a good friend he had known for 30 years, a chemist working and living in the same small town in Ontario that this individual, Mr. Khan, had obtained a substantial refund of nearly $40,000 and had shown the cheque to the Appellant, and then advised that a particular individual, Mr. Thompson, had been an agent or a participant in obtaining the services of a tax preparer that resulted in that refund being forthcoming.

So Mr. Morrison has been a car salesman for many, many years, filed his own paper returns for 40 years, sometimes got a small refund, sometimes owed a bit of money, and never had any interaction or complaint or problem whatsoever with Revenue Canada or Canada

Revenue Agency. He is provided with a request for a T1 adjustment which he signs where the arrows tell him to sign. The Statement of Agent Activities, I find as a fact, was not included.

There was a reference, certainly, on the T1 adjustment form as counsel for the Respondent points out to a business loss. Mr. Morrison doesn't particularly pay much attention to that except he has in his mind that someone who has earned about $65,000 a year for ten years that even if there is the capacity to go back five years for a recalculation at a couple or $3,000 a year overpayment, that that could also produce a decent refund if that is in accordance with the Tax Act as assessed by the Minister of National Revenue through the Canada Revenue Agency.

So that goes in, and then Mr. Morrison obtains a letter inquiring about this business loss and he phones the auditor, subsequent to which he contacts the tax preparer, Rasool, and says, "I am getting these questions. Here is a letter I got. What do I do?"

He follows up on that and then very quickly e-mails them in capital letters and says, "Is this a scam? I am going to report this to the fraud squad."

When the nonsense letter arrives that he is being asked to sign and submit to CRA, Morrison absolutely refuses. He reads it and he said, "This is garbage. I am a citizen of Canada. I have been paying my taxes for 40 years. This is absolute nonsense. I won't go

along with this." Counsel is retained, and thereafter, a Notice of Objection is filed.

So there is, in my mind on the evidence, not that kind of conduct that constitutes willful blindness, and there most certainly is no intentional acting. He believed with good reason that there was some justification for asking for a recalculation of tax previously paid based on those returns for previous years, and he provided that information to Thompson as intermediary to be taken to Rasool.

These facts are not at all consistent with the facts in *Bhatti*, 2013 TCJ No. 123. They are not consistent with the facts in *Brisson*, 2013 TCJ No. 2010, nor in the other cases referred to including the judgment of Mr. Justice Campbell Miller in *Torres*.

Looking at the evidence as a whole, there isn't that kind of conduct here that permits a finding, in my view, of gross negligence either based on the intentional acting or the willful blindness by continuing, as Mr. Justice Rooke said in the *Meads v Meads* case, of stubbornly continuing to pull the wool over your own eyes.

Now, I am aware of the decision that was handed up to me, *Morton v The Queen*, 2014 DTC, and this particular decision referred to a T1 amendment request, and the appellant's counsel there had argued that it was not a return. The court referred to that and to the use of the form, but in this particular instance, just the

mere reference to the business income and loss and the size of the numbers that in the Appellant's mind went back for a considerable number of years, did not in the absence of a Statement of Agent Activities -- and in the absence of that ridiculous posturing that the Appellant was somehow a separate individual as a living person from the one assigned to him by the government through a social insurance number, doesn't indicate to me that there was any false representation or intent, as Mr. Justice Bocock found, made solely to generate a refund because Mr. Morrison was presenting the information on a reference of a friend to what he thought was a qualified tax preparer so that Canada Revenue Agency could assess that request and make a determination whether it was in fact legitimate and whether he was entitled to a refund.

Thankfully, CRA took a look at it, did its investigation, said no. There is no business loss here, and Mr. Morrison thereafter cooperated with the appropriate investigation division of CRA and regrets ever having been led into applying for that T1 adjustment request.

That error on his part based on a recommendation from a friend he had known for years in a small town is a long, long way from that kind of conduct that justifies the imposition of the penalty under subsection 163(2).

Counsel for the Respondent has adequately brought forward to the court the necessary information

and documentation to assist the court in arriving at an opinion, and has also fairly characterized the testimony of Mr. Morrison as being credible, but quite rightly argued that the T1 adjustment request itself under the circumstances was sufficient to justify the imposition of the penalty by the Minister. That is fair and that is good lawyering, and I accept that.

The appeal is allowed, and the matter is referred back to the Minister of National Revenue for consideration and reassessment on the basis that the penalty imposed under subsection 163(2) be deleted.

MR. RADNOFF: Obviously, I do have a submission on costs.

JUSTICE ROWE: Okay.

MR. RADNOFF: My submission is this: CRA has taken the position of assessing in each one of these cases. It may very well be that the trial is necessary, as Your Honour has stated.

However, I am also of the view that had some of these cases been investigated at the audit stage, as they should have been, as opposed to just assessing every single person, some of this may not have happened.

The reality is, and my client is here, it is probably costing him close to $20,000 in legal fees to be here.

JUSTICE ROWE: I know.

MR. RADNOFF: And we have done a lot of work, and the consequences to him at his age would have

been devastating, so I am seeking costs in this case. I don't think that an award of $10,000 is unreasonable. It only partially gives him some money back for legal costs. He did make a mistake. He is paying for the mistake still.

Those are my submissions, Your Honour.

JUSTICE ROWE: But you see, back in 2010, really, that is about when the situation matured to the point where this flood had become obvious. Pretty well at that point, and sometimes even earlier, the refunds weren't at least being sent out or were being stopped.

MR. RADNOFF: Yes.

JUSTICE ROWE: So there was an inundation of these situations. It is not really the role of CRA, although they do their best, to kind of be the protector and send out all these warning notices and post them on their website, other than the generic one: Don't fall for this stuff.

MR. RADNOFF: It is actually not even about the warning. It is more --

JUSTICE ROWE: At the audit level.

MR. RADNOFF: At the audit level, you should call --

JUSTICE ROWE: Or the objection level.

MR. RADNOFF: Yes, call the taxpayer.

JUSTICE ROWE: I know.

MR. RADNOFF: Meet with the taxpayer. What happened? Not just blindly assess all these people. That

gets them into an expensive legal proceeding.

JUSTICE ROWE: Right.

MR. RADNOFF: Which I think it is important also to consider the cost to this court of having to have dealt with all these cases, some of which, in my respectful submission -- and I know CRA was doing their best -- should not really have come to a trial necessarily.

JUSTICE ROWE: Okay, counsel. What do you have to say about costs?

MS. BEAHEN: Your Honour, obviously I strongly disagree. Mr. Radnoff just said obviously, this case shouldn't have come to court. Your Honour just said you understand why this case had to come to court. We had to come to court to get all this testimony and go through all this.

JUSTICE ROWE: But they are entitled to some costs. Tariff -- tax court tariff is very low. Right?

MS. BEAHEN: It should be tariff, Your Honour. There is no reason to deviate from the tariff in this case. The Respondent didn't delay in any way. Discoveries were done in writing. I can't speak to what Mr. Radnoff's fees are, but there is no reason to deviate from tariff in this case, in a case where we all acknowledge it did have to come to court.

JUSTICE ROWE: All right. Now, without more, if I just say the Appellant is entitled to costs,

that without more means tariff; doesn't it?

MS. BEAHEN: Yes, Your Honour.

MR. RADNOFF: It is somewhat easier to just make that the decision today, even if it is obviously -- the tariff range, as my friend notes, for a trial like this is about $3,500 to $5,000 roughly. I think it just makes sense to make a number. It just saves costs for my client, just so we don't have to go back and forth.

MS. BEAHEN: Your Honour, there is no reason to do a number. If you say costs on the tariff, then Mr. Radnoff can submit his bill of costs to us and we will look at it. There is no reason to avoid that process. It is very short.

JUSTICE ROWE: They are not very much. All right. The Appellant is entitled to costs. That will be pursuant to the tariff.

MS. BEAHEN: Thank you, Your Honour.

JUSTICE ROWE: I was at a seminar last year when there was a Justice of the Supreme Court of Ontario dealing with the matter of costs. Another Justice from Alberta - my own province where I practiced - and they said costs in Tax Court are low.

MR. RADNOFF: It would not be unusual, and most of our practice is in Superior Court, for costs to be in the range of $50,000 to $100,000 for this trial.

JUSTICE ROWE: Yes, but that is why in addition to the fee component, Chief Justice McLachlin says you are seeing self-represented people at absolutely

every level. Right? You have to win a lottery before we can hire one of you guys.

All right. Thank you very much, counsel. Well-argued case. Thank you.

MS. BEAHEN: Thank you, Your Honour.

THE REGISTRAR: Order. All rise. Court is adjourned.

--- Whereupon the hearing was adjourned at 12:00 p.m.