Citation: 2009 TCC 456
Date: 2009**1119**
Docket: 2007-2083(IT)G

BETWEEN:

RONALD COUTRE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

AMENDED REASONS FOR JUDGMENT

McArthur J.

[1] This appeal is from a reassessment by the Minister of National Revenue (the Minister) arising from a Judgment of Beaubier J. issued March 31, 2006. The issue boils down to whether the Appellant is barred from appealing the Minister's reassessment by the doctrine of *res judicata* and subsection 169(2) of the *Income Tax Act* (the *Act*).

[2] Pursuant to the Judgment, the Minister reassessed the Appellant for the 1998 taxation year, to reduce the amount of the benefit included in the calculation of his income from $119,840 to $91,485. The main issue under appeal is whether the Appellant is entitled to offset his shareholder loans against the benefit he received pursuant to subsections 56(2) and 15(1) of the *Act*, resulting from a reassessment in accordance with a previous Tax Court of Canada decision. The narrow question is

whether the Appellant is barred from appeal upon application of *res judicata* and/or subsection 169(2) of the *Act*.

Facts

[3] The parties have submitted an agreed statement of facts which states:

1. The reassessment in issue in this appeal results from this Court's March 31, 2006 decision rendered in the Appellant's previous appeal (docket number 2003-3274(IT)G). (Tax Court decision, Joint book of documents, Tab 1)

2. At issue in that appeal was whether the Appellant had received a benefit with respect to the transfer of real property situated at 596 Atkins Road ("Lot A") and 628 Atkins Road ("Lot B") in Victoria, British Columbia.

3. At all material times, the Appellant was the sole shareholder and director of Phoenix Estates Ltd., a company incorporated under the laws of British Columbia.

4. At all material times, the company was involved in the business of real estate development.

5. At all material times, the Appellant's spouse was Coralee (also known as Cori) Coutre.

6. Prior to May 15, 1998, the company was the sole owner of Lot A.

7. Prior to May 15, 1998, the company owned a one-half interest in Lot B. The remaining one-half interest in Lot B was owned by Malcolm Developments Inc., an arm's length company.

8. On May 15, 1998, Lots A and B were transferred in their entirety from the company and Malcolm Developments to Mrs. Coutre for consideration of $1,000.00 per lot.

9. On July 9, 2002, the Minister reassessed the Appellant's 1998 taxation year to add the amount of $162,640.00 as a benefit in that year, calculated as follows:

Lot A:		
Fair market value	$73,000.00	
Less: consideration paid	(1,000.00)	
Add: GST	5,040.00	
Subtotal		**$77,040.00**
Lot B:		
Fair market value	$81,000.00	
Less: consideration paid	(1,000.00)	
Add: GST	5,600.00	
Subtotal		**$85,600.00**
TOTAL		**$162,640.00**

10. The Appellant filed a notice of objection dated September 3, 2002.

11. On September 5, 2003, the Minister reassessed the Appellant's 1998 taxation year to decrease the amount of the benefit to $119,840.00, calculated as follows:

Lot A:		
Fair market value	$73,000.00	
Less: consideration paid	(1,000.00)	
Add: GST	5,040.00	
Subtotal		**$77,040.00**
Lot B:		
Fair market value	$81,000.00	
Less: consideration paid	(1,000.00)	
Add: GST	5,600.00	
Subtotal	$85,600.00	**$85,600.00**
Divide by 2 for one-half interest		
TOTAL		**$119,840.00**

12. The Appellant appealed the September 5, 2003 reassessment to this Honourable Court (Tax Court appeal number 2003-3274(IT)G and the matter was heard on March 15 and 16, 2006, on common evidence with three other related appeals (Phoenix Estates Ltd. v. Her Majesty the Queen, Tax Court appeal numbers 2003-3121(IT)G and 2003-3277(GST)I, and Cori Coutre v. Her Majesty the Queen, Tax Court appeal number 2003-3275(IT)I.

13. The Appellant's position was that he had not received a benefit and the fair market values of Lots A and B were $1,000.00 each. The Appellant's secondary position was that the fair market values of Lots A and B were $23,000.00 and $28,000.00, respectively.

14. On March 31, 2006, this Court rendered its decision finding, *inter alia,* that the fair market values of Lots A and B were $73,000.00 and $28,000.00, respectively. This Court also found that the Appellant had received an indirect benefit based on these fair market values. The Minister was ordered to reassess accordingly.

15. On June 15, 2006, the Minister of National Revenue assessed the Appellant's 1998 taxation year with a benefit of $91,485.00, calculated as follows:

Lot A:		
Fair market value	$73,000.00	
Less: consideration paid	(1,000.00)	
Add: GST	5,040.00	
Subtotal		**$77,040.00**
Lot B:		
Fair market value	$**28,000.00**	
Less: consideration paid	(1,000.00)	
Add: GST	**1,890.00**	
Subtotal	**28,890.00**	
Divide by 2 for one-half interest		**$14,445.00**
TOTAL		**$91,485.00**

16. The Appellant filed a notice of objection dated October 27, 2006. (Notice of objection, Joint Book of Documents, Tab 2)

17. In the Appellant's notice of objection, he sought to apply his shareholder loan account balance with the company against the amount of the reassessed benefit.

18. The Minister confirmed the reassessment on February 13, 2007, without reviewing the company's financial statements. (Notification of Confirmation, Joint Book of Documents, Tab 3)

19. The unaudited financial statements show a shareholder loan account balance of $14,583.00 and $73,171 for 1998 and 1999, respectively. (1998 and 1999 Financial Statements, Joint Book of Documents, Tabs 4 and 5)

20. Applying the unaudited shareholder loan amounts as an offset against the benefit results in:

1998 shareholder loan	$14,583
Less benefit	$91,485
Net benefit	$76,902

1999 shareholder loan	$73,171 - $14,583 = $58,588
Less benefit carryforward	$76,902
Net benefit	$18,314

21. The issue in this appeal is whether the Appellant can offset his shareholder loans against the benefit resulting from the previous Tax Court decision.

[4] As mentioned, the 2006 reassessment presently under appeal results from a previous Tax Court of Canada decision rendered by Beaubier J. and issued on March 31, 2006. At issue in the previous appeal was whether the Appellant had received a benefit with respect to the transfer of real property in Victoria, British Columbia. The Appellant was the sole shareholder and director of Phoenix Estates Ltd. and his spouse is Coralee.

[5] Prior to May 15, 1998, Phoenix was the sole owner of Lot A and owned a one-half interest in Lot B. The remaining one-half interest in Lot B was owned by Malcolm Developments Inc. (hereinafter Malcolm), an arm's length company. On May 15, 1998, Lots A and B were transferred in their entirety from Phoenix and Malcolm to Coralee for consideration of $1,000 per lot.

[6] The Minister reassessed the Appellant's 1998 taxation year to reflect the amount of the benefit to $119,840. The Appellant's position was that he had not received a benefit and that the fair market value (FMV) of the lots was $1,000 each. His secondary position was that the FMV of Lot A was $23,000 and the FMV of Lot B was $28,000, respectively.

[7] Beaubier J. found, that the FMV of Lots A and B were $73,000 and $28,000, respectively and held that the Appellant had received an indirect benefit totalling $91,485. Upon Beaubier J.'s Order, the Minister reassessed the Appellant's 1998 taxation year and included a benefit of $91,485. The Appellant sought to apply his shareholder loan account balance with Phoenix against the amount of the reassessed benefit.

[8] The unaudited financial statements show a shareholder loan account balance of $14,583 and $73,171 for the 1998 and 1999 years, respectively. Applying the unaudited shareholder loan amounts as an offset against the benefit would result in a total net benefit of $18,314 to be added to the Appellant's income as opposed to $91,485.

Appellant's position

[9] The Appellant submits that he is entitled to offset the shareholder loans against the benefit he is alleged to have received. In the alternative, he asserts that there was no benefit received, merely a reduction in his shareholder loan account balance by way of a deemed repayment.

Respondent's position

[10] The Appellant is precluded from seeking to amend the amount of the benefit previously found by this Court pursuant to subsection 169(2) of the *Act*.

[11] Further this appeal is subject to the doctrine of *res judicata* given that the Appellant did not raise the issue of his shareholder loan account nor did he request that any amounts be offset against his shareholder loan account at any stage of his previous appeal. Under the doctrine of *res judicata*, he is estopped from raising arguments that could have been argued at the original hearing in exercise of reasonable diligence.

[12] The Respondent further adds that it is not now open to the Appellant to do his tax planning retroactively following the Tax Court's decision.

First appeal

[13] In *Phoenix Estates Ltd. v. The Queen*,[1] the taxpayer (Phoenix) appealed its 1998 taxation year whereby the Minister had increased the proceeds of disposition in respect of the transfer of Lots A and B from $2,000 to $112,000. The issues under appeal were as follows:

a) whether the FMV of Lot A was at least $73,000 as of May 15, 1998;

b) whether the FMV of Lot B was at least $81,000 as of May 15, 1998; and

c) whether the Minister properly assessed the Appellant for additional proceeds of disposition totalling $112,000 in the 1998 taxation year.

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1 2006 TCC 206, Joint Book of Documents, Tab 1.

[14] Beaubier J. concluded that the FMV of Lots A and B was not $1,000 each as claimed, but rather $73,000 and $28,000, respectively. Phoenix transferred the lots at the direction of the Appellant, its sole shareholder, Ronald Coutre, as a benefit that he desired to confer to his wife Coralee. Beaubier J. concluded that the Appellant knew that the transfers would confer a benefit on his wife and $91,485 was to be included in the Appellant's 1998 income. The Minister was directed in part as follows:

> 2. Respecting appeal 2003-3274(IT)G that the Minister properly assessed Ronald Coutre for receiving a benefit to be calculated correspondingly for the 1998 taxation year, based on the fair market values found in these Reasons.

Doctrine of *Res Judicata*

[15] In *McFadyen v. The Queen*[2], Rip C.J. cited *Henderson v. Henderson*[3] when stating the rule of cause of action estoppel (*res judicata*) as follows:

> 24 … where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies … not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[16] Further, Rip C. J. relied in *Angle v. Minister of National Revenue,*[4] to set out a successful issue estoppel pleading. He explained that issue estoppel required the following three elements: (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final; and, (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. A taxpayer may be barred from appealing a new issue where it could have been raised in the first action but was not.

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2 2008 DTC 4513 (T.C.C.).

3 (1843) Hare 100 (Eng. V.-C.), Vol. LXVII, English Reports (containing Hare, Vol.2 to 6) 313.

4 [1975] 2 S.C.R. 248 (S.C.C.).

> 33 The Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, firmly established that there is a judicial discretion whether to apply issue estoppel when the requirements of that doctrine have been met. Similarly, judicial discretion seems to exist with respect to cause of action estoppel.

[17] Finally, *McFadyen* at paragraph 39 refers to *Phosphate Sewage Co. v. Molleson*[5] with respect to special circumstances of new evidence:

> As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. …

[18] Counsel for the Appellant acknowledged that this issue could have been before the Court in the previous appeal, but that it was not. The issue in the previous appeal was simply a valuation dispute and the shareholder loan account did not arise until the decision was rendered and offsetting was never placed in question. He explains that, applying acceptable accounting principals, the Appellant's shareholder's loan should be reduced by the amount of the benefit. He acknowledged that the shareholder loan account issue could have, but need not, to have been raised in the previous appeal as an alternative argument.

[19] I now turn to the application of the three elements of estoppel: (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final; and, (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. It is clear that Beaubier J.'s judgment was a final decision of a court of competent jurisdiction and the parties to both appeals are the same which satisfies criteria (i) and (iii).

[20] The question before me was decided in the original appeal. Beaubier J. found that the Appellant received a benefit and that the assessment should be calculated based on the FMV found in his Reasons. It is inherent in the Judgment that the benefit be added to the Appellant's income. There is absolutely no reference to

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5 (1879), 4 App. Cas. 801 (H.L.).

offsetting. The issue in both appeals is the same: what is the amount of the benefit received by the Appellant in respect of the transfer of Lots A and B? The first criterion to issue estoppel is met given that we have the same set of facts and the same arguments as those pleaded in the earlier litigation. Estoppel does not only apply to issues decided finally and conclusively by the Court, it applies also to arguments that could have been raised by a party in exercise of reasonable diligence. The Appellant could have brought forward the argument of offsetting his shareholder loans against the benefit during the first appeal. The Appellant was the sole shareholder and director of Phoenix and was aware of the company's financial standing and his outstanding shareholder loan account. I have no doubt he was aware of transferring a benefit to his spouse, which amount of the benefit was conclusively and finally decided by this Court in the Appellant's first appeal. Consequently, the Appellant is barred from appealing his 2006 reassessment in view of the doctrine of *res judicata.* The shareholder's loan does not constitute new evidence and no serious injustice would be inflicted by applying *res judicata*.

[21] In conclusion, the following statement of Paris J. in *Ahmad* applies equally to the present appeal.

> 30 … It is often the case in litigation that the determination of a particular issue in a particular way will influence the determination of related issues, but this does not relieve a party from the obligation of putting forward all of the foreseeable related issues at once. Otherwise, as it has already been observed, there might be no end to litigation.

[22] Having decided that *res judicata* applies, there is no need to consider the subsection 169(2) submissions, yet a brief comment may be appropriate. For the most part, the above reasons apply to the Appellant's subsection 169(2) submissions together with 165(1.1). In *Chevron Canada Resources Ltd v The Queen*,[6] Chevron was estopped from bringing the issue of computation. The Federal Court of Appeal held that it does not have to be the exact same issue as the one raised in the original proceeding. The issue is the amount of the benefit. This was determined in the previous proceeding by Beaubier J. As found with respect to *res judicata*, the Appellant is barred from appealing his 2006 reassessment pursuant to subsection 169(2).

[23] Counsel for the Appellant did not specifically address subsection 169(2), he merely stated that this case is the type that is allowed under 169(2) where it is a

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6 [1999] 4 C.T.C. 140 (F.C.A.).

different issue from the original proceeding. Paris J. in *Ahmad* summarized the conclusion in *Chevron* as follows:

> 22 Bowman, A.C.J. of this Court found that the new matters to which the taxpayer was objecting were reasonably related to the matters which gave rise to the reassessments and had not been conclusively decided by the Court. Therefore the taxpayer's right to object to those matters was not precluded by subsection 165(1.1).
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> 23 On appeal, the Court […] reversed the finding that these matters had not been conclusively determined by the Tax Court in its Consent Judgment. […] The Court of Appeal rejected the taxpayer's argument that the Consent Judgment only disposed of the specific issues which it addressed and no more. It held that, by virtue of the doctrine of *res judicata*, a judgment of a Court conclusively determines all undecided but related matters to the subject of the litigation, including those that could have been raised at the time. [This can be said equally for the present case.]Committee of the Privy Council in *Thomas v. Trinidad & Tobago (Attorney General)*:

[24] As stated, I agree with the Respondent, I am of the opinion that the question in this appeal is related to the matter that was before Beaubier J. in the first appeal. Even if the issue in this case was not related to any issues in the first appeal, it is an issue that could have been raised in the previous appeal and the same arguments noted above in respect of *res judicata* also apply here.

Offsetting of Shareholder Loan Account against Benefit

[25] The Appellant relied on *Franklin v. R.*[7] to support his argument that he is entitled to offset the shareholder loans against the benefit received.

[26] Appellant's counsel further noted that the Federal Court of Appeal had expressed that there could be no justifying or ignoring the fact that no benefit was conferred on the taxpayer in *Franklin.* Therefore, assessing tax on the basis of financial statements that were found to be in error would lead to an incorrect result. He claims that in this case, the Minister has fallen into the same error by not taking into account the shareholder loan and allowing the offset.

[27] I accept the Respondent's position that *Franklin* does not apply to the appeal before me for two reasons. First, in *Franklin*, the Court paid particular attention to the

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7 [2000] 4 C.T.C. 2332 (T.C.C.). Affirmed in [2002] 2 C.T.C. 88 (F.C.A.).

fact that there was a series of bookkeeping errors, but in this case there were no bookkeeping errors committed that lead to an unjust result to the Appellant. The Appellant merely undervalued the lots in its financial records. Second, the Respondent explains that in *Franklin,* the errors led the Minister to believe that the taxpayer had received a benefit, when he had not. However, it is a fact that a benefit was conferred on the Appellant in this appeal and, therefore, *Franklin* can be distinguished based on these two reasons.

[28] Appellant's counsel purports that because of the workings of subsection 15(1) and its double tax, the taxpayer should be allowed to offset the shareholder loan against the benefit received. He explains that there was no wrongdoing in Beaubier J.'s finding; the Appellant simply had the value wrong. It may not be as simple as that. The Appellant was an experienced land developer and ought to have known that his value attributed to the lots was seriously unrealistic although nothing falls on this.

[29] The benefit was found by this Court to be an indirect benefit under subsection 56(2) of the *Act* and was properly included in the Appellant's income under subsection 15(1). In his capacity as sole shareholder and director of the Phoenix, the Appellant directed that the company's interests in Lots A and B be transferred to Coralee. The apparent double taxation effect is a necessary result of the nature of the benefit and the Appellant's relationship to the company.

[30] It is clear that the facts in this case differ significantly from that of *Franklin,* in that there were no bookkeeping errors in this appeal. It was admitted by the Appellant that he sought to confer the benefit to his wife as a family planning strategy and there were no bookkeeping errors. Further in the first appeal, Beaubier J. found that there was a benefit pursuant to subsection 15(1), and in *Franklin,* no benefit was found to arise.

[31] In this appeal, the Appellant is seeking the right to rewrite his own transactional history, and to do what perhaps he should have done before. This is retroactive tax planning and it is not permissible. See *Adam v. Minister of National Revenue* [8].

[32] The appeal is dismissed, with costs.

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8 85 DTC 667.

Signed at Ottawa, Canada, this **19**th day of **November**, 2009.

"C. H. McArthur"

McArthur J.

CITATION:	2009 TCC 456
COURT FILE NO.:	2007-2083(IT)G
STYLE OF CAUSE:	RONALD COUTRE and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Victoria, British Columbia,
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REASONS FOR JUDGMENT BY:	The Honourable Justice C.H. McArthur
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