

CITATION: 2010 TCC 90

2009-345(IT)I

BETWEEN:

NEVILLE TYRELL,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

**EDITED VERSION OF TRANSCRIPT  
OF REASONS FOR JUDGMENT**

Let the attached edited transcript of the Reasons for Judgment delivered orally from the Bench at Toronto, Ontario, on January 18, 2010, be filed. I have edited the transcript (certified by the Court Reporter) for style, clarity and to make minor corrections only. I did not make any substantive change.

Signed at Ottawa, Canada, this 15<sup>th</sup> day of February 2010.

"Patrick Boyle"

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Boyle J.

Citation: 2010 TCC 90  
Date: 20100215  
Docket: 2009-345(IT)I

BETWEEN:

NEVILLE TYRELL,

Appellant,

and

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**EDITED VERSION OF TRANSCRIPT**  
**OF REASONS FOR JUDGMENT**

[delivered orally from the Bench at Toronto, Ontario, on January 18, 2010]

**Boyle J.**

[1] This is an informal tax appeal by Mr. Tyrell involving approximately \$10,000 of income assessed for 2004. Mr. Tyrell is a retired truck driver who has represented himself in court.

[2] I am allowing Mr. Tyrell's appeal, because the Crown has the burden of proof and has not provided sufficient evidence to persuade me on a balance of probabilities of its version of the events.

[3] Today is not the first court appearance required on this matter. The trial was first set down before me last August. At the outset of last August's hearing the Crown asked to amend its reply, since its assumptions were that the amount was business income earned by Mr. Tyrell as an independent contractor trucker, and that was its legal position. The original reply did not plead section 5, dealing with employment income.

[4] I allowed the Crown's motion to amend its reply, but adjourned the hearing to allow Mr. Tyrell time to prepare. To that point he was only trying to explain that he was not an independent contractor but was an employee, so he did not have \$10,000

of business income and appropriate withholdings should have been made. The adjournment has given both sides the time to more fully prepare.

[5] I must note that again we have the Crown filing an inadequately drafted original reply. The Crown is choosing to have non-lawyers, so-called agents, who I understand are the Canada Revenue Agency employees, prepare legal proceedings before this Court. I said before and repeat that this can produce some very unfortunate results, and at times those will end up having to be borne by the Crown.

[6] Last August the Crown was represented by a student. In this case the Crown is fortunate that last August I did not do what the then Associate Chief Justice Bowman did in 2002 in *Poulton v. Canada*, [2002] 2 C.T.C. 2405, which was approved by Justice of Appeal Rothstein of the Federal Court in *Burton v. The Queen*, 2006 DTC 6133, in 2006. Neither of these cases was referred to me last August.

[7] These cases provide generally that procedural fairness requires that self represented individual taxpayers in informal tax appeals not be faced with last-minute, start-of-trial, limited notice, informal requests by the Crown to amend its pleadings in a very material way.

[8] Had I been made aware of the Federal Court of Appeal's decision in *Burton*, I would have refused to exercise my discretion and allow the amendment to the reply, in which case Mr. Tyrell's appeal would have been allowed then, and today's further appearance would not have been necessary.

[9] In any event, the Crown bears the burden of proof to satisfy me on a balance of probabilities of its alternative position in its amended reply that the \$10,000 was additional employment income earned and for which tax withholdings were not withheld and remitted.

[10] A further amendment to the Crown's position was received at the opening of today's hearing. The Crown confirmed that it would no longer be pursuing the penalties assessed against Mr. Tyrell.

[11] Yet another amendment to the Crown's position came in the course of this morning. The Crown agreed that it had no real evidence to support its primary position that Mr. Tyrell was an independent contractor. That is, the Crown agreed with Mr. Tyrell that he was always and only ever an employee of Quality Haulage.

[12] The remaining disagreements between the parties were, when did Mr. Tyrell work there, did he receive the cheques in question, and had employee withholdings been made.

[13] Mr. Tyrell testified that he worked for Quality Haulage from the fall of 2003 to September 2004. The cheques in question are for the period September through December 2004. The Crown did not call a witness who could testify to Mr. Tyrell actually working at Quality Haulage in that period to contradict his testimony.

[14] The Crown's only witness was the outside bookkeeper and accountant for Quality Haulage. She had prepared Mr. Tyrell's T4 for employment income and a T5018 for his independent contractor payments, based primarily on information provided by the company's bookkeeper, who was the owner's sister.

[15] The Crown's position today is that the T5018 amounts were in error and should have also been reflected on the T4. The taxpayer's position is also that it was all employment income, but he maintains all deductions were made weekly — "they took their money."

[16] Implicit in the taxpayer's position is that he agrees that the T5018 was wrongly issued on behalf of his employer, but the answer is not just to say the income should have been reflected on his T4. His position is that the additional withholdings should also be reflected on the T4 as both income and withholdings.

[17] The Crown has not satisfied me with sufficient evidence to conclude its version of events is correct.

[18] Neither the owner of the business or his sister testified, nor do I have any employer reconciliation of its aggregate employee withholdings. Clearly, Quality Haulage made some mistake or other in the information it gave its outside accountant, which formed the basis of the T4 issued to Mr. Tyrell. The evidence does not allow me to conclude, even on a balance of probabilities, which of the possible mistakes it was.

[19] Further, Mr. Tyrell acknowledges that the signatures on the copies of the backs of the cheques were his, but that since he did not receive any cheques in the period, he did not actually endorse any cheques. He suggests it must have been doctored at some point by his employer or someone else.

[20] In evidence before me are photocopies of the backs of cheques, separate from the copies of the fronts of the cheques. The originals, which would have proved valuable, were not entered in evidence, even though the company's accountant testified she still had them in storage somewhere.

[21] I was not given any evidence of how Mr. Tyrell's employer had issued the T4 for the year 2003. I was not given a Record of Earnings prepared by the employer for Employment Insurance purposes.

[22] While I am left with some doubts about what actually happened, clearly the Crown did not lead sufficient evidence in support of its position and inconsistent with Mr. Tyrell's testimony to satisfy me on a balance of probabilities that the reassessment should stand.

[23] I am allowing the appeal and referring the assessment back to the Minister for reconsideration and reassessment in accordance with these reasons. I am also fixing costs in Mr. Tyrell's favour at \$200.

[24] We are adjourned. Thank you, Madam Court Reporter. Thank you, Mr. Registrar. Thank you, Mr. Tyrell. Thank you, Ms. Hurst.

Signed at Ottawa, Canada, this 15<sup>th</sup> day of February 2010.

"Patrick Boyle"

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Boyle J.

CITATION: 2010 TCC 90

COURT FILE NO.: 2009-345(IT)I

STYLE OF CAUSE: NEVILLE TYRELL v. HER MAJESTY  
THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 18, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Patrick Boyle

DATE OF JUDGMENT: February 15, 2010

APPEARANCES:

For the appellant: The appellant himself

Counsel for the respondent: Samantha Hurst

ALSO PRESENT:

Court Registrar: Michel Lortie

Court Reporter: Andrea Kovats

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.  
Deputy Attorney General of Canada  
Ottawa, Canada