

Docket: 2011-1939(IT)G

BETWEEN:

LES PRODUCTIONS SKY HIGH COURAGE INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion heard on common evidence with the motion
of fiducie familiale Samson (2011-2338(IT)G)
on July 19, 2013, at Québec, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant: Louis Sirois

Counsel for the respondent: Martin Lamoureux

JUDGMENT

The motion is granted, and the appeal from the assessment made under the *Income Tax Act* for the 2001 taxation year is dismissed, in accordance with the attached reasons.

The appellant shall pay to the respondent the costs of the motion and all the costs in this case incurred after September 12, 2012. I fix these costs at \$1,000, which shall be payable by Productions Sky High Courage to the respondent prior to January 1, 2015.

Signed at Ottawa, Ontario, this 7th day of November 2014.

“Gaston Jorré”

Jorré J.

Translation certified true
on this 13th day of March 2015

François Brunet, Revisor

BETWEEN:

FIDUCIE FAMILIALE SAMSON,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion heard on common evidence with the motion of

Productions Sky High Courage Inc. (2011-1939(IT)G)

on July 19, 2013, at Québec, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the appellant: Louis Sirois

Counsel for the respondent: Martin Lamoureux

ORDER

The motion is granted in part, in accordance with the attached reasons, and the Court orders as follows:

1. The proceedings are suspended, and
 - (a) if Carl Samson's appeal is dismissed and the time period for appealing the decision has elapsed, the respondent may bring a motion to dismiss, and the appeal will be dismissed once the Court is satisfied that the appeal of Carl Samson is dismissed and that the appeal period has elapsed; or
 - (b) if Carl Samson's appeal is ultimately allowed, the trust may proceed with its appeal, but solely to argue that the adjustment of Carl Samson's debt means that the trust's assessment must be adjusted or vacated; the trust will not be able to rely on any other ground in support of its appeal. For example, the trust will not be able to claim that there is no relationship between the trust and Carl Samson.

2. The trust shall pay \$4,000 in costs to the respondent prior to January 1, 2015.

Signed at Ottawa, Ontario, this 7th day of November 2014.

“Gaston Jorré”

Jorré J.

Translation certified true

on this 24th day of December 2014

François Brunet, Revisor

Citation: 2014 TCC 333

Date: 20141107

Dockets: 2011-1939(IT)G

2011-2338(IT)G

BETWEEN:

LES PRODUCTIONS SKY HIGH COURAGE INC.,

FIDUCIE FAMILIALE SAMSON,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR DECISIONS

Jorré J.

[1] Les Productions Sky High Courage Inc. is appealing from an assessment whereby the Minister reduced the amount of the film production tax credit claimed by the appellant by the approximate amount of \$227,000.

[2] The fiducie familiale Samson [Samson family trust] is appealing from an assessment made under section 160 of the *Income Tax Act* (Act). The Minister alleges that Carl Samson transferred a house to the trust, that the trust and Carl Samson were not dealing with each other at arm's length, that the fair market value of the residence was \$296,000 and that at the time of the transfer Carl Samson owed amounts under the Act totalling approximately \$594,000.

[3] In its Notice of Appeal, the trust claims, *inter alia*, that Carl Samson is not in any way connected to the trust.

[4] I note that Carl Samson and Armand Samson have also filed appeals before this Court.

[5] In both appeals (the trust and Productions Sky High Courage), the respondent brought a motion to dismiss the appeal, with costs of the motion and the appeal on the merits. The respondent submits that each appellant failed to

comply with the orders of this Court and failed to prosecute its appeal with due dispatch.¹

[6] The two appeals were heard concurrently and are related. While there are common elements, there are also elements that differ between the two cases.

[7] The respondent made her case by filing a number of affidavits. Although the appellants have not filed any affidavits, I allowed the appellants to have Carl Samson and Armand Samson testify.

[8] In each file, there is an order dated February 16, 2012, ordering, *inter alia*, that

- (a) the parties prepare a list of documents (partial disclosure) and serve the list on the opposing party no later than August 15, 2012,
- (b) the undertakings arising out of the examinations for discovery be complied with no later than October 15, 2012.

[9] The respondent submits that both appellants failed to serve their list of documents on her within the prescribed deadline and had yet to do so at the time of the hearing on July 19, 2013.

¹ See rule 64 of the *Tax Court of Canada Rules (General Procedure)*.

[10] The affidavits produced by the respondent do not address this issue. However, rule 81 of the *Tax Court of Canada Rules (General Procedure)* (Rules) not only provides that the list must be served on the other party but also that it must be filed with the Court. From what I can see, there is no indication that the list was filed in these two cases, and the appellants did not contest this allegation at the hearing. Considering that the respondent began examinations for discovery without receiving each of the appellants' list of documents, I do not believe that this, in itself, is significant.

[11] The trust failed to meet the October 15, 2012, deadline for fulfilling the undertakings given at the examination for discovery; at the time of the hearing, it had yet to fulfill its undertakings.

[12] The examination for discovery of the trust was held on September 13, 2012. Carl Samson, a trustee of the trust, was examined.

[13] According to the affidavit of François Bernier, sworn on October 10, 2012, Carl Samson made a statement, a few minutes prior to his examination of September 13, 2012, that he had instructed counsel for the appellant to object to any material question.

[14] During the presentation of evidence, this statement by Mr. Bernier was not challenged.

[15] On his examination for discovery, Carl Samson refused to answer many questions, and he also refused to undertake to produce numerous documents that were requested.²

[16] *Inter alia*, he refused to answer questions pertaining to the identity of the settlor of the appellant, the identity of the other trustees, the identity of the beneficiaries and the subject matter of the trust. Among the undertakings he refused to fulfill was the one to produce the trust deed.

[17] The respondent brought a motion to require Carl Samson to answer the refused questions and to provide the documents requested.

[18] Without deciding the motion, I will make the observation that it is surprising that, in a case in which a significant issue arises as to whether or not a relationship between Carl Samson and the trust exists, the objections that I just mentioned would be raised.

[19] This motion was to be heard on February 26, 2013, but in the meantime counsel for the two appellants, Carl Samson and Armand Samson, filed a motion to be removed as counsel of record for the four appellants.

² See paragraphs 6 and 8 of the affidavit of Mr. Bernier and Exhibit 1 to the affidavit.

[20] The motion to be removed as counsel of record was heard on February 25, 2013, via teleconference and was granted. The order of March 11, 2013, also

- (a) adjourned the February 26, 2013, hearing of the respondent's two motions,
- (b) ordered that the two appellants be represented by counsel and that the new counsel appear on their behalf in Court no later than March 25, 2013; and
- (c) ordered the four appellants to pay costs to the respondent in the amount of \$1,500 upon receipt of the order.

[21] The two appellants' new counsel failed by a few days to meet the March 25, 2013, deadline to appear in Court. However, the appellants not only failed to pay the costs in the amount of \$1,500 upon receipt of the order, but they also had yet to pay at the time of the hearing four and a half months later.

[22] In his testimony, Carl Samson stated that it was his counsel at the time who was in charge of the trust's undertakings and that she never requested in writing or orally that he respond to the undertakings.

[23] As for the non-payment of the \$1,500 in costs upon receipt of the order, he testified as follows:

[TRANSLATION]

I wasn't told about that. I wasn't told about the details of the invoice for \$1,500 or what the judge did.³

[24] I cannot accept the testimony on these issues as I have difficulty with the witness's credibility, not only because it is unlikely that his counsel at the time did not raise the issue of undertakings with her client, but also because I cannot believe that he was unaware of his obligation to pay \$1,500 given the following facts.

[25] The order of March 11, 2003, applies to the four appeals, namely, the trust, Productions Sky High Courage, Carl Samson and Armand Samson. The order's heading contains the docket name and number of these four appeals and the content is identical for the four appeals. The order is quite clear:

[TRANSLATION]

The case management hearing and the respondent's motion were adjourned, with costs in the amount of \$1,500, payable by the appellants to the respondent upon receipt of this order

[26] When one looks at the Court docket, including the electronic portion, one notes that, in the case of the trust, the Registry forwarded a copy of the decision to the trust, that, in the case of Productions Sky High Courage, the Registry

forwarded a copy of the decision to Productions Sky High Courage, that, in the case of Carl Samson, a copy of the order was forwarded to Carl Samson and that, in the case of Armand Samson, a copy of the order was forwarded to Armand Samson.

[27] There is a third reason for not accepting the testimony; that reason is discussed below in the context of what happened at the examination for discovery of Productions Sky High Courage.

[28] The trust's behaviour that I have just described is not that of a party that is prosecuting an appeal with due dispatch.

[29] The trust failed to comply with the Court orders relating to certain deadlines. I note that paying \$1,500 in costs to the other party is really not all that complicated and, considering that I do not accept that the trust was unaware of said obligation, there is absolutely no justification for the non-payment of the costs.

[30] There is one element that is even more important. In instructing counsel not to answer any material questions at the examination for discovery, the trust demonstrated a willingness to deliberately delay and prolong the appeal proceedings.

³ Transcript, page 38.

[31] In the circumstances, I agree with the respondent that it would be appropriate to dismiss the appeal⁴ except for one hesitation.

[32] My hesitation is as follows. One of the elements required for the assessment under section 160 is the existence of Carl Samson's debt. However, at the time of the hearing, Carl Samson's appeal was still pending before this Court as he challenged his assessment.

[33] If Carl Samson is ultimately successful to such a degree that the trust's assessment would logically have to be reduced, it would appear to me to be unfair not to adjust or vacate the trust's assessment accordingly.⁵

[34] Submissions were made by the respondent that if I dismissed the trust's appeal and Carl Samson was ultimately successful with the logical consequence that the trust's assessment would have to be adjusted, a remedy would be available to the trust by way of judicial review given the nature of section 160 of the Act, which is a collection mechanism and, in particular, of paragraph 160(3)(b) which

⁴ See the decision of Justice Lamarre in *Bourque v. The Queen*, 2002 CanLII 809 (TCC), at paragraphs 38 to 42. I note that the respondent has not alleged prejudice. Although that is a relevant consideration in such a motion, the existence of prejudice is not a required element to dismiss a case. See, for example, in a different context, the decision of the Ontario Court of Appeal in *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, particularly at paragraphs 19 to 33.

⁵ I believed at one point that it might not be necessary for me to decide this issue. I learned from the Registry that motions had been filed in the appeals of Carl Samson and Armand Samson and that those motions included motions to dismiss the appeal. The parties had suggested to the Registry that it would be efficient to have me be the judge hearing these motions. For practical reasons, that was not possible, and the motions were heard by another judge. After hearing those motions, this Court dismissed the appeals of Carl Samson and Armand Samson; however, the issue is still relevant as the appellants have appealed from the decisions of this Court to the Federal Court of Appeal.

provides that payment by Carl Samson would, to a sufficient degree, reduce the trust's debt.

[35] I have concluded that while it was not necessary for me to decide whether the trust would have another remedy if I dismissed the appeal, the ultimate outcome in Carl Samson's appeal was such that it would be logical to adjust the trust's assessment.

[36] Although this Court is a statutory court, it is also a superior court of record.⁶ The law is quite clear that a court has the inherent power to control its process. Of course, that power is subject to any statutory provision that applies to the court and to the rules of the court. However, this power to control its process is still very important, especially in situations not provided for in the rules.⁷

[37] Accordingly, this Court may issue an order that sanctions the trust in such a way that the practical effect is almost identical to a dismissal of the appeal, while keeping open the possibility of adjusting the assessment if Carl Samson is successful to a degree that would render the adjustment of the trust's assessment logical.

⁶ *Tax Court of Canada Act*, section 3.

⁷ This is reflected, *inter alia*, in rule 4(2) of the *Tax Court of Canada Rules (General Procedure)*. I also note that rule 70 provides that a motion may be allowed in part.

[38] Accordingly, with respect to the fiducie familiale Samson, the Court orders as follows:

The proceedings are suspended, and

- (a) if Carl Samson's appeal is dismissed and the time period for appealing the decision has elapsed, the respondent may bring a motion to dismiss, and the appeal will be dismissed once the Court is satisfied that the appeal of Carl Samson is dismissed and that the appeal period has elapsed; or
- (b) if Carl Samson's appeal is ultimately allowed, the trust may proceed with its appeal, but solely to argue that the adjustment of Carl Samson's debt means that the trust's assessment must be adjusted or vacated; the trust will not be able to rely on any other ground in support of its appeal. For example, the trust will not be able to claim that there is no relationship between the trust and Carl Samson.

[39] The respondent sought costs not only for the motion, but also for any action brought. This is entirely appropriate in the circumstances. I set these costs at \$4,000 payable by January 1, 2015.

[40] In the case of Productions Sky High Courage, there are certain elements that are essentially the same as those in the trust's appeal. In particular, the situation is the same with respect to the list of documents, the slight delay in appointing new counsel after the order dated March 11, 2013, and the non-payment of the \$1,500 in costs ordered to be paid in that order.

[41] However, there is one very different element. The examination for discovery of Productions Sky High Courage, Carl Samson and Armand Samson was held on September 12, 2012, and very clearly states that, in the case of Productions Sky High Courage, the parties agreed that Productions Sky High Courage would discontinue its appeal without costs. At page 64 of the transcript of the examination for discovery, the following is stated:

[TRANSLATION]

Louise Lévesque

for the appellants:

Therefore, following the discussions between counsel and the parties, Les Productions Sky High Courage Inc. discontinues its opposition, without costs.

Okay then.

Martin Lamoureux

for the respondent:

In its Notice of Appeal.

Louise Lévesque

for the appellants:

In its Notice of Appeal

That's all!

[42] Following the discontinuance, the respondent did not proceed with the examination for discovery of Productions Sky High Courage.

[43] By letter dated September 19, 2012, the respondent asked Ms. Lévesque, *inter alia*, to send the respondent a Notice of Discontinuance without costs for signature and filing in the Court.

[44] By letter dated November 1, 2012, written on behalf of all the parties by counsel for the respondent, reference was made to the status of the appeals and the discontinuance of Productions Sky High Courage. A copy of the letter was sent to Ms. Lévesque.

[45] With respect to the discontinuance above, Carl Samson testified that the instruction he gave Ms. Lévesque was conditional and that Productions Sky High Courage would abandon its appeal provided that a satisfactory resolution in the appeals of the trust, Carl Samson and Armand Samson was reached.⁸

⁸ Transcript, pages 27 to 29 and 32 to 33.

[46] On cross-examination, Carl Samson confirmed that he was present at the examination for discovery but that he did not recall hearing Ms. Lévesque say that Productions Sky High Courage was discontinuing the appeal.⁹

[47] Nor did Armand Samson, who was also present, recall Ms. Lévesque saying that Productions Sky High Courage was discontinuing the appeal.

[48] I am sorry, but I cannot accept that Carl Samson and Armand Samson did not hear Ms. Lévesque. Accordingly, I do not accept their testimony on this issue.¹⁰

[49] Thus, there are some delays on the part of Productions Sky High Courage and, primarily, the failure to pay costs, something that is not difficult to do.

[50] There is also the fact that Productions Sky High Courage discontinued its appeal and that, given the passage cited, the respondent agreed that Productions Sky High Courage could discontinue its appeal without costs.

[51] In the circumstances, I do not see how I could conclude that Productions Sky High Courage prosecuted its appeal with due dispatch given that it decided to discontinue its appeal.¹¹

⁹ Transcript, page 40, question 40.

¹⁰ As can be seen at page 64 of the transcript, it is clearly indicated that the passage cited above occurred immediately following the [TRANSLATION] “resumption of the examination” and that immediately following the passage cited, it is stated [TRANSLATION] “and the affiant has nothing further to say at the moment.” Immediately after that, at page 65, is the official certification by the stenotypist. I cannot believe that they did not hear this very short and simple dialogue.

[52] Accordingly, the appeal of Productions Sky High Courage is dismissed.

[53] The respondent seeks costs in respect of the motion and the case.

[54] In the circumstances, it is appropriate to award costs to the respondent, but because there was an agreement that Productions Sky High Courage could discontinue its appeal without costs, costs shall be limited to the period following September 12, 2012. I must also take into account the fact that the motion was heard in conjunction with the trust's motion. Accordingly, I set these costs at \$1,000, which shall be payable by Productions Sky High Courage to the respondent prior to January 1, 2015.

Signed at Ottawa, Ontario, this 7th day of November 2014.

“Gaston Jorré”

Jorré J.

¹¹ Although the motion in Productions Sky High Courage was not a motion asking the Court to enforce a settlement, I note that this Court does indeed have the power to do so; see the decision of Justice D'Auray in *SoftSim Technologies Inc. v. The Queen*, 2012 TCC 181. The evidence before me is clear that the discontinuance was also a settlement as the respondent agreed that there would be no costs.

Translation certified true
on this 13th day of March 2015

François Brunet, Revisor

CITATION:	2014 TCC 333
COURT FILE NOS.:	2011-1939(IT)G 2011-2338(IT)G
STYLE OF CAUSE:	LES PRODUCTIONS SKY HIGH COURAGE INC., FIDUCIE FAMILIALE SAMSON, v. THE QUEEN
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	July 19, 2013
DATE OF ADDITIONAL WRITTEN SUBMISSIONS:	August 15 and 16, 2013
REASONS FOR DECISIONS BY:	The Honourable Justice Gaston Jorré
DATE OF JUDGMENT IN 2011-1939(IT)G:	November 7, 2014
DATE OF ORDER IN 2011-2338(IT)G:	November 7, 2014
APPEARANCES:	
Counsel for the appellants:	Louis Sirois
Counsel for the respondent:	Martin Lamoureux
COUNSEL OF RECORD:	
For the appellants:	Louis Sirois
Firm:	Sirois, Tremblay et associée Québec, Quebec
For the respondent:	William F. Pentney Deputy Attorney General of Canada

