1965

*Apr. 12
Apr. 14

GERTRUDE D. SMITH, JAMES S. SMITH and BERNARD E. SMITH, Jr., Executors of the last Will and Testament of Bernard E. Smith, deceased ..... APPLICANTS;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeals—Taxation—Income tax—Leave to appeal—Whether appeal from Taxation Board to Exchequer Court a trial de novo—Whether decision by Exchequer Court on procedural matter subject to review by Supreme Court—Income Tax Act, R.S.C. 1952, c. 148, ss. 91, 99(2).

The Crown appealed to the Exchequer Court from a decision of the Income Tax Appeal Board. The taxpayer moved for an order quashing the appeal or, alternatively, for an order striking from the notice of appeal all passages alleging misrepresentation or fraud. Both motions were dismissed by the Exchequer Court. The taxpayer applied for leave to appeal to this Court. The substantial question to be debated on the appeal would be whether an appeal from the Income Tax Appeal Board to the Exchequer Court was in the nature of a trial *de novo*.

Held: The application for leave to appeal should be refused.

It has already been decided in *Campbell v. M.N.R.*, [1953] 1 S.C.R. 3, that an appeal from the Tax Appeal Board to the Exchequer Court was a trial *de novo*.

The striking out of parts of the notice of appeal deals with a procedural matter. S. 99(2) of the *Income Tax Act* gives the Court or a judge a discretionary power to do so, and it was never intended that decisions in the Exchequer Court on ordinary questions of practice or procedure should be subject to revision by this Court.

Appels—Revenu—Impôt sur le revenu—Permission d'appeler—Un appel à la Cour de l'Échiquier d'un jugement de la Commission d'Appel de l'Impôt sur le Revenu est-il un procès de novo*—La décision de la Cour de l'Échiquier sur une matière de procédure est-elle sujette à revision par la Cour suprême—Loi de l'Impôt sur le Revenu, S.R.C. 1952, c. 148, arts. 91, 99(2).*

La Couronne appela à la Cour de l'Échiquier d'un jugement de la Commission d'Appel de l'Impôt sur le Revenu. Le contribuable présenta une requête pour faire rejeter l'appel ou, alternativement, pour faire radier de l'avis de l'appel tous les passages alléguant dol ou fraude. Ces requêtes furent rejetées par la Cour de l'Échiquier. Le contribuable fit une demande pour permission d'appeler devant cette Cour. La question substantielle a être débattue en appel serait à savoir si

---

* PRESENT: Hall J. in Chambers.

un appel à la Cour de l'Échiquier d'un jugement de la Commission d'Appel de l'Impôt sur le Revenu est de la nature d'un procès *de novo*.

Arrêt: La demande pour permission d'appeler doit être refusée.

Il a déjà été décidé dans la cause de *Campbell v. M.N.R.*, [1953] 1 R.C.S. 3, qu'un appel à la Cour de l'Échiquier d'un jugement de la Commission était un procès *de novo*.

La radiation de parties de l'avis de l'appel soulève une question de procédure. L'art. 99(2) de la *Loi de l'Impôt sur le Revenu* donne à la Cour ou à un juge un pouvoir discrétionnaire de faire cette radiation, et les décisions de la Cour de l'Échiquier sur des questions ordinaires de pratique ou de procédure n'ont jamais été destinées à être sujettes à revision par cette Cour.

DEMANDE devant le juge Hall en Chambre pour permission d'appeler d'un jugement interlocutoire du Président de la Cour de l'Échiquier. Demande refusée.

APPLICATION before Hall J. in Chambers for leave to appeal from an interlocutory judgment of the President of the Exchequer Court. Application dismissed.

I. S. Johnston, Q.C., for the applicant.

D. S. Maxwell, Q.C., contra.

The following judgment was delivered by

HALL J. (*in Chambers*):—The application for leave to appeal to this Court from the judgment of the learned President of the Exchequer Court dismissing an application by the applicants for an order quashing the respondent's appeal from the judgment of the Tax Appeal Board dated August 20, 1964, with respect to an income tax assessment for the 1953 taxation year and which also dismissed a motion by the applicants for an order striking out from the respondent's Notice of Appeal in respect of the assessment for the 1953 taxation year all those parts thereof alleging misrepresentation or fraud should be refused. The substantial question, namely, whether an appeal from the Tax Appeal Board to the Exchequer Court of Canada is or is not in the nature of a trial *de novo* which the applicants contend should be dealt with by the Supreme Court of Canada has already been decided by the Court in *Campbell v. Minister of National Revenue*.[1]

In that case, Locke J., speaking for the Court, said:

[1] [1953] 1 S.C.R. 3, [1952] C.T.C. 334, [1952] D.T.C. 1187.

1965

SMITH *et al.* v. MINISTER OF NATIONAL REVENUE

Hall J.

The proceedings on an appeal in such matters to the Exchequer Court are in the nature of a trial *de novo* and the appellant again gave evidence in that Court (1951) Ex. C.R. 290 and was cross-examined at length, and further evidence was given by his wife as to the reasons which had led her husband to sell certain of the properties.

and at p. 6:

While the proceedings before the Income Tax Appeal Board under the provisions of the *Income Tax Act* are by way of appeal from decisions of the Minister, the proceedings in the present matter are indistinguishable from those upon the trial of issues in other courts of record. By subsection 2 of section 91 of the *Act,* upon completion of the steps required by the statute on an appeal to the Exchequer Court, the matter is to be deemed as an action in that Court and the proceedings are conducted in the same manner as in other actions.

Mr. Johnston argued that these extracts from *Campbell v. Minister of National Revenue, supra,* were *obiter dicta.* I am unable to agree with that submission. In *Goldman v. Minister of National Revenue;*[1] the Honourable Mr. Justice Thorson, then President of the Court, went very fully into the point in issue here and concluded with this statement with which I agree:

There are, I think, several reasons for accepting the submission of counsel for the appellant that the appeal to this Court from a decision of the Income Tax Appeal Board, whether by the taxpayer or the Minister, is a trial *de novo* of the issues involved therein. While there are several descriptions of the proceedings as an appeal and while it is true that on the appeal the Registrar of the Income Tax Act Appeal Board is required by section 91(1) of the *Income Tax Act* to transmit to the Registrar of this Court "all papers filed with the Board on the appeal thereto together with a transcript of the record of the proceedings before the Board" there is no provision that the appeal must be based on such record. On the contrary, section 89(3) requires the appellant to set out in the notice of appeal a statement of the allegations of fact, the statutory provisions and reasons which he intends to submit in support of his appeal and section 90(1) calls upon the respondent to serve and file a reply to the notice of appeal admitting or denying the facts alleged and containing a statement of such further allegations of fact and of such statutory provisions and reasons as he intends to rely on. There is nothing in these provisions to restrict the parties to the allegations of fact made before the Board. Additional facts or even different facts may be alleged. Then section 91(2) provides that upon the filing of the material referred to in section 91(1) or 91A and of the reply required by section 90, "the matter shall be deemed to be an action in the court and, unless the Court otherwise orders ready for hearing". This section is almost identical with section 63(2) of the *Income War Tax Act.* Its purpose is to give the parties the benefits of the proceedings in an action to establish their respective allegations which would not be available in an ordinary appeal. There would be no purpose in these provisions if Parliament intended that the appeal should be heard on the basis of the record before the Income Tax Appeal Board. They contemplate that the issues as defined by the

[1] [1951] Ex. C.R. 274 at 279, [1951] C.T.C. 241.

statement of facts and the reply should be tried by this Court according to the processes of an action in this Court. This necessitates a trial *de novo*. While this view lends itself to the possibility that the taxpayer or the Minister may make a different case or defence in this Court from that made before the Board and it may seem anomalous that Parliament should permit this there is nothing in the Act to bar it. The freedom of the Court to deal with the issues raised before it, without regard to the proceedings before the Board, is further indicated by the provision in section 91(3) that any fact or statutory provision not set out in the notice of appeal or reply may be pleaded or referred to in such manner and upon such terms as the Court may direct and by the power given to the court by section 91(4) of disposing of the appeal by dismissing it, vacating or varying the assessment or referring it back to the Minister.

All these considerations lead to the conclusion that the appeal to this Court from a decision of the Income Tax Appeal Board, whether by the taxpayer or by the Minister, is a trial *de novo* of the issues involved, that the parties are not restricted to the issues either of fact or of law that were before the Board but are free to raise whatever issues they wish even if different from those raised before the Board and that it is the duty of the Court to hear and determine such issues without regard to the proceedings before the Board and without being affected by any findings made by it.

The second branch of the application, namely, to strike out certain parts of the Notice of Appeal with respect to the 1953 taxation year clearly deals with a procedural matter. Section 99(2) of the *Income Tax Act* gives the Court or a judge the discretionary power to strike out a Notice of Appeal or any part thereof. The learned President, Mr. Justice Jackett, in exercising his discretion, refused to strike out the parts of the Notice of Appeal objected to.

. . . it was never intended that decisions in the Exchequer Court on ordinary questions of practice or procedure should be subject to revision by this Court.

Kerwin C.J. in *Coast Construction Company v. The King*.[1]

The application for leave to appeal will therefore be dismissed with costs.

Application dismissed.

Solicitors for the applicants: Lash, Johnston, Sheard. & Pringle, Toronto.

Solicitor for the respondent: E. S. MacLatchy, Ottawa.

[1] [1951] S.C.R. 759 at 762.