

**Elchuk (Appellant) v. Minister of National Revenue (Respondent)**

Jackett P.—Saskatoon, May 26, 27, 28, 29, 1970.

*Income tax—Pleadings—Wilful evasion of payment of tax—Penalty for—Concealment of income—Whether evasion of payment of tax—Failure in pleading to allege amount of tax evaded—Dismissal of appeal—Income Tax Act, s. 56 (1).*

The Minister's reply to a notice of appeal from an income tax assessment cross-appealed for a penalty under s. 56 (1) of the *Income Tax Act* for wilful evasion or attempted evasion of income tax. The reply did not, however, allege any amount of tax that was evaded or sought to be evaded.

*Held*, the Minister's cross-appeal must be dismissed. In the absence of the allegation referred to it would be impossible for the court to determine whether any particular penalty was in an amount authorized by s. 56 (1).

Wilful evasion or attempted evasion of the tax payable under s. 56 (1) is not limited to action taken by a taxpayer to evade collection of tax, e.g. by transferring his assets to others or taking them out of the country, but extends to concealment of the existence of income. *Légaré Foundry Ltd. v. Minister of National Revenue*, 36 Tax A.B.C. 351, disapproved.

APPEAL from decision of Tax Appeal Board upholding net worth assessment of appellant for the years 1952 to 1969. CROSS-APPEAL by the Minister from decision of Tax Appeal Board that penalties under s. 56 of the *Income Tax Act* for all except the 1969 taxation year were wrongfully imposed.<sup>1</sup>

*A. Hawrish* for appellant.

*J. A. Scollin* and *I. H. Pitfield* for respondent.

JACKETT P.—On the cross-appeal, I note first that the penalties in question were levied under section 56 (1) of the *Income Tax Act*, which reads as follows:

56. (1) Every person who has wilfully, in any manner, evaded or attempted to evade payment of the tax payable by him under this Part for a taxation year or any part thereof is liable to a penalty, to be fixed by the Minister, of not less than 25% and not more than 50% of the amount of the tax evaded or sought to be evaded.

and that they were disallowed by the Tax Appeal Board for the reasons given in *Légaré Foundry Ltd v. Minister of National Revenue*.<sup>2</sup> The reasons referred to are, I believe, in part, those set out in the quotation at page 375 from Mr. Fisher's judgment in *No. 632 v. Minister of National Revenue*,<sup>3</sup> reading:

...Section 51A is merely a penalty provision which is to be applied if the Minister is of the opinion that the taxpayer has wilfully evaded, or attempted to

<sup>1</sup> The judgment is reported only on the cross-appeal.

<sup>2</sup> 36 Tax A.B.C. 351.

<sup>3</sup> 22 Tax A.B.C. 120.

evade, *payment* of the tax payable by him, or any part thereof, for a taxation year. Evasion or attempted evasion of payment of the whole or any part of the tax payable by a taxpayer can very easily be quite a different thing from committing a fraud or making wilful misrepresentation, and is a distinct and separate offence from that envisaged by the provisions of subsection (4) of Section 46 of chapter 148 of the Revised Statutes of Canada which gives the Minister the power to re-assess at any time. I need only indicate one example, where a taxpayer has fully reported all his income and has made no misrepresentation, either innocent or wilful, and has committed no fraud whatsoever. He has not, however, made any payment against his assessed tax and has so dealt with his assets, by transferring them to other parties or taking them outside the jurisdiction, that he has attempted to evade *payment* of the tax which the Minister has assessed against him. In such a case, the legislation provides that the Minister may impose an additional penalty and endeavour to collect this amount in addition to the tax previously owing, but I am sure it will be recognized that this is not the same thing as the misrepresentation or fraud referred to in Section 46 of the *Income Tax Act*.

I cannot agree with the view expressed in this passage that the penalty provision only applies to action taken to evade collection of tax. In my view, one can evade payment of income tax by concealing the existence of the income just as effectively as by concealing one's assets so that the tax cannot be collected.

The view of the effect of section 56(1) adopted in the *Légaré* case is also supported (page 382) by reference to the definition of "tax payable" contained in section 139(1)(*ba*). I cannot agree that this provision makes section 56(1) inapplicable in respect of what has happened before the assessment.

I am, however, of the view that the cross-appeal should nevertheless be dismissed because the reply to the notice of appeal does not sufficiently allege the facts necessary for its success.

The allegations of facts, or of facts that were assumed in making the assessments for penalties, as set out in the reply, do not establish, if correct, that the penalty assessments were properly made. Without saying whether or not the pleading would otherwise be sufficient, it will suffice to say that there is no allegation of any amount of tax that was evaded, or sought to be evaded. In the absence of such information, it is impossible for the court to determine whether any particular penalty was in an amount authorized by section 56(1). If such amounts had been so alleged, the allegations would have necessarily involved connecting up the amounts with the facts giving rise to the application of section 56 (1) in such a way as to raise the factual issues that the court would have to decide to determine whether the penalties were properly imposed. The appellant would then have been put on notice of what was alleged against him and could have pleaded accordingly so that the issues of fact, if any, would have been crystallized for purposes of trial.<sup>4</sup>

In the result, both appeals are dismissed without costs.

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<sup>4</sup> As I indicated during argument, this is not a case in which, after the hearing, I would be prepared to allow an amendment to the reply except upon terms that there be a further hearing on the new issues of facts raised by the amendment.