

Toronto
1966
Nov. 8

BETWEEN:

JOHN KENNETH KINSELLA APPELLANT;

AND

THE MINISTER OF NATIONAL }
REVENUE } RESPONDENT.

*Income tax—Assessments for five years—Appeals to Tax Appeal Board—
Appeals therefrom by taxpayer to Exchequer Court for three years—
No appeal by Minister—Whether Minister may subsequently cross-
appeal from Board's decisions re other two years—Income Tax Act,
ss. 60(2), 99(1a), 99A(1) and (3).*

Appellant appealed to the Tax Appeal Board from his income tax assess-
ments for 1955, 1956, 1957, 1958 and 1959, and after judgment was
delivered in all five appeals appealed to the Exchequer Court from
the Board's decisions in respect of the assessments for 1955, 1956 and
1957. Neither party appealed from the Board's decisions in respect of
the assessments for 1958 and 1959 within the time prescribed by
s 60(2) of the *Income Tax Act* Respondent subsequently filed replies
to appellant's appeals for the years 1955, 1956 and 1957 and therein
purported to cross-appeal from the Board's decisions in respect of the
assessments for 1958 and 1959. Appellant moved under Exchequer
Court rule 114 to strike out these cross-appeals.

Held, the purported cross-appeals were a nullity and must be struck
out. Under s. 99(1a) of the *Income Tax Act* there cannot be a
cross-appeal from a decision of the Tax Appeal Board in respect of an
assessment for a taxation year unless there has been an appeal from
the decision of the Board on that assessment.

[Section 99A(1) and (3) of the *Income Tax Act* referred to]

MOTIONS to strike out cross-appeals from decisions of
Tax Appeal Board.

David A. Ward for appellant.

N. A. Chalmers for respondent.

GIBSON J.:—Three motions of the appellant are being
heard together. They are in respect to the appeal proceed-
ings before this court for the taxation years of the appel-
lant 1955, 1956 and 1957. They are made pursuant to Rule
114 of this court and are applications to strike out the
cross-appeals of the respondent, the Minister, contained in
each of the appeal proceedings of the appellant referred to.

The appeal proceedings to this court are from the decision of the Tax Appeal Board dated December 17, 1963 in respect to five separate appeal proceedings taken by the appellant, John Kenneth Kinsella, namely, for the taxation years 1955, 1956, 1957, 1958 and 1959.

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The appellant appealed from the said decision of the Tax Appeal Board in respect to his appeals for the taxation years 1955, 1956, and 1957 only. The appellant did not appeal from the decision of the Tax Appeal Board in respect of his appeals for the taxation years 1958 and 1959.

The appeals before this court of the appellant were made within 120 days from the day on which the Registrar of the Tax Appeal Board mailed the said decision of that Board as prescribed by section 60(1) of the *Income Tax Act*.

The respondent did not appeal from the said decision of the Tax Appeal Board for the taxation years of the appellant 1958 and 1959. Instead, long after 120 days from the day on which the Registrar had mailed the decision of the Tax Appeal Board, the respondent purported to cross-appeal in respect to this decision of the Tax Appeal Board concerning the appellant's appeals to the Tax Appeal Board for the years 1958 and 1959, in each of the proceedings of appeal of the appellant for the taxation years 1955, 1956 and 1957. Counsel for the respondent submitted that this was permissible by reason of the provisions of section 99, subsection 1(a) of the *Income Tax Act* which reads as follows:

If the respondent desires to appeal from the decision of the Tax Appeal Board, he may, instead of filing a notice of appeal under section 98, give notice by his reply (notwithstanding that it is filed and served after the expiration of the time for appeal fixed by section 60) by way of cross-appeal of his intention to contend that the decision of the Tax Appeal Board should be varied and set out therein a statement of such further allegations of fact and of such statutory provisions and reasons as he intends to rely on in support of the contention.

I am of the opinion that what the respondent purported to do in this matter is a nullity. Instead there must be an appeal launched from the decision of the Tax Appeal board in respect to an appeal to it from an assessment for a taxation year before there can be a cross-appeal pursuant

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to the enabling provisions of section 99, subsection 1(a) of the *Income Tax Act*. The remedial section 99A, subsection (1) of the *Income Tax Act* makes this clear, especially the contradistinction between the words "notices of appeal" and "notice of appeal". It reads as follows:

Where the Minister or a taxpayer may appeal to the Exchequer Court of Canada with respect to more than one assessment in relation to that taxpayer, the notices of appeal in relation to such appeals may be included in one document and that document shall be deemed to be the notice of appeal with respect to each assessment to which it relates.

This view is further reaffirmed by the wording of section 99A, subsection (3) which reads:

Where notices of appeal have been included in one document under subsection (1), the replies, notices of cross-appeal and replies to cross-appeals arising from those notices of appeal may, in each case, be included in one document.

In the result therefore, because no appeals were taken from the decision of the Tax Appeal Board in respect to the taxation years of the appellant for the years 1958 and 1959, in my view the purported cross-appeals contained in the proceedings for the appeals in the years 1955, 1956 and 1957 are a nullity. As a consequence, the motions to strike out are allowed. The appellant is entitled to the costs of these motions, but there shall be one set of costs.