

CANADA / JUDGMENT

R. v. Isaak

2020 BCSC 686

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 686 R. v. Isaak

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Isaak,

2020 BCSC 686

Date: 20200501

Docket: X081456

Registry: New Westminster

Regina

v.

Willi Isaak

Before: The Honourable Madam Justice B.J. Brown

On appeal from: An order of the Provincial Court, dated March 8, 2019 (R. v. Isaak, 2019 BCPC 329, Port Coquitlam Docket No. 95817-2-C)

Reasons for Judgment

Counsel for Crown:

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J. Flood

T. Berg

Place and Date of Hearing:

New Westminster, B.C.

February 5, 2020

Place and Date of Judgment:

New Westminster, B.C.

May 1, 2020

- [1] This is an appeal from a conviction of the appellant entered by the Provincial Court of British Columbia on March 8, 2019.
- [2] Mr. Isaak was charged with tax offences under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) [ITA] and the Excise Tax Act, R.S.C. 1985, c. E-15. The charges relate to a real estate project in Anmore, British Columbia.
- [3] The trial judge found Mr. Isaak guilty on Counts 1 to 3, 5 to 7 and 9 of the Information, which related to management fees and a partially refunded deposit. Counts 2, 5 and 7 were stayed pursuant to Kienapple principle. He was acquitted on Count 4.
- [4] The appellant alleges that the trial judge made errors of law in interpreting the relevant provision and rendered a verdict that was unreasonable and unsupported by the evidence. He says that there is no evidence to establish intentional wrongdoing and the convictions must be overturned.

Background

- [5] Willi Isaak and Barbara Isaak are married. Baarak United Enterprises Ltd. is an Alberta corporation involved in real estate development. The Isaaks are directors and officers of Baarak and each holds 50% of the shares.
- [6] In 2003 Baarak bought 20 acres in Anmore for development. Mr. Isaak managed the business day to day. Mrs. Isaak was the company bookkeeper, although she was not a trained bookkeeper. Baarak retained an accounting firm to prepare its year end statements and tax returns. From time to time Baarak paid personal expenses for the Isaaks which would be adjusted at year end by the accounting firm. The firm also prepared the Isaak's personal tax returns.
- [7] This appeal concerns management fees paid by the Lockwoods and a BC Hydro refund.
- [8] The Lockwoods bought one of the lots from Baarak and contracted with Baarak to build their residence. They agreed to pay management fees to Baarak. Mr. Isaak prepared invoices from Baarak to the Lockwoods for the management services.

- [9] In August 2009 Mr. Isaak deposited the management fees from the Lockwoods into the Baarak business account noting "SH loan" on the deposit slip. It was recorded as a shareholder investment in Baarak's general ledger. It was not reported as income to Mr. or Mrs. Isaak or to Baarak in their tax returns.
- [10] In 2010 the Lockwoods paid management fees of \$69,077.57. When invoicing these fees, Mr. Isaak requested on the invoice that payment be made to W. Isaak (not Baarak). Some of the cheques for these fees were endorsed by Mr. Isaak and deposited by Mrs. Isaak to their personal account, some were deposited by Mr. Isaak to their personal account. This, too, was not reported as income in the tax returns of Baarak or the Isaaks.
- [11] Baarak was required to pay BC Hydro a deposit for overhead electrical installation for a pump house for the subdivision. Baarak paid \$100,053.45 to Hydro for this and was told that this was a preliminary charge which would be re-estimated on completion, that Hydro would refund the difference. In April 2009 Hydro told Mr. Isaak that there would be a refund. He instructed Hydro to make the refund cheque payable to him instead of Baarak. Hydro did so. The cheque for \$26,481.30 was deposited to the Isaak's personal account with "BC Hydro refund" noted on the deposit slip. Baarak did not report receiving revenue of \$26,481.30 from Hydro. The refund was not reported as income on either of the Isaak's personal returns.
- [12] Mr. and Mrs. Isaak did not testify. The evidence at trial came from their accountant, from the books and records and from admissions.

Position of the Appellant

[13] Mr. Isaak argues:

1. On all counts there was insufficient circumstantial evidence to prove mens rea of the offences beyond a reasonable doubt and the verdict was therefore unreasonable;
2. In the alternative the actus reus of Counts 1, 3, 7 and 9 were not proven beyond a reasonable doubt because:
 - a. On Count 1 the appellant did not make false statements with respect to the Hydro refund because this amount was not required to be reported as income;
 - b. On Count 3 the appellant did not evade taxes in 2010 tax returns because it had tax losses available to be carried forward from 2009 sufficient to negate the alleged tax liability in 2010; and
 - c. On Counts 7 and 9 the appellant did not make false statements or evade taxes by not reporting the management fees and Hydro refund in his personal tax returns because no tax liability arose from depositing these amounts into the personal account. His shareholder loan account was sufficient to offset these amounts.

[14] Mr. Isaac faced the following charges:

- Count 1 making false statements with respect to the corporate tax return of Baarak United Enterprises Ltd. for the year ending November 30, 2009;
- Count 2 making false statements in the corporate tax return of Baarak United Enterprises Ltd. for the taxation year ending November 30, 2010;
- Count 3 wilfully evading or attempting to evade taxes imposed on Baarak United Enterprises Ltd. for the tax year ending November 30, 2009 and November 30, 2010;
- Count 4 making false statements in the goods and services tax return of Baarak United Enterprises Ltd. for the period ending May 31, 2009;
- Count 5 making false statements in the goods and services tax return of Baarak United Enterprises Ltd. for the periods ending August 31, 2009, May 31, 2010, August 31, 2010, November 30, 2010 and November 30, 2011;
- Count 6 wilfully evading or attempting to evade taxes pursuant to Part IX of the Excise Tax Act for the reporting periods of Baarak Enterprises Ltd. ending May 31, 2009, August 31, 2009, May 31, 2010, August 31, 2010, November 30, 2010 and November 30, 2011;
- Count 7 making a false statement in his T1 General Income Tax and Benefit Returns for 2009 and 2010;
- Count 9 wilfully evading or attempting to evade payment of taxes for the 2009 and 2010 taxation years.

Elements of the Offences

[15] For the offence of making false or deceptive statements in returns (counts 1, 2, 5, 7) the Crown must prove beyond reasonable doubt:

1. the tax return was filed;
2. the return contained a false or deceptive statement;
3. the accused made, participated in, assented to or acquiesced in making false or deceptive statements;
4. the accused knew that the statement was false or deceptive.

(R. v. Millar, 2016 BCSC 2039)

[16] For the offence of tax evasion (counts 3 and 9), the Crown must prove:

1. there was income;
2. there was at least some income tax payable;
3. the accused knew that there was tax imposed;

4. that the accused voluntarily preformed an act or engaged in a course of conduct that avoided or attempted to avoid payment of tax;
5. that the accused engaged in the conduct for the purpose of avoiding or attempting to avoid payment of tax or knowing that avoiding a payment of tax was a virtual certainty as a consequence of his actions.

(R. v. Porisky, 2019 BCCA 159; Samaroo v. Canada Revenue Agency, 2019 BCCA 113)

Standard of Review

- [17] Section 686(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46, provides that an appeal court may set aside a conviction where the verdict is unreasonable or cannot be supported by the evidence or the decision below is drawn on a question of law.
- [18] In R. v. Vickers, 2016 BCCA 98 the court said:
- [22] In my view, the substance of this appeal is better seen as an argument that the verdict is unreasonable because the evidence left open reasonable inferences that were inconsistent with guilt. In relation to this question, the law is clear. Section 686(1)(a)(i) of the Criminal Code, R.S.C. 1985, c. C-46, provides that a conviction may be set aside on the grounds that "it is unreasonable or cannot be supported by the evidence." The issue under s. 686(1)(a)(i) is whether, on the whole of the evidence, the verdict is one which a properly instructed trier of fact, acting judicially, could have reached. In reviewing the verdict, this Court may engage in a re-examination and reweighing of the evidence, through the lens of judicial experience, for the limited purpose of deciding whether the verdict is reasonable. We do not substitute our view of the evidence for that of the trial judge. We defer to the trial judge's findings of fact and factual inferences, interfering only if the judge made a palpable and overriding error. The analysis is the same whether the case is based on direct or circumstantial evidence: R. v. Ngo, 2009 BCCA 301 at paras. 6-7, 60, 65; R. v. Munif, 2009 BCCA 451 at paras. 9-12.
- [23] As is well-known, in a circumstantial case, the trier of fact must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the facts. The proper approach, as the judge recognized here, is not to examine each individual circumstance in isolation. Rather, the question is whether all of the evidence taken together proves an accused's guilt and is inconsistent with any other rational conclusion: Ngo at paras. 53-57. Although the burden of proving guilt always rests on the Crown, that burden does not include an added burden of negating every speculative conjecture consistent with innocence: R. v. Tahirsylaj, 2015 BCCA 7 at para. 39.
- [19] Additionally, as indicated in R. v. Biniaris, 2000 SCC 15, a decision may be set aside as unreasonable where:

37 The Yebes test is expressed in terms of a verdict reached by a jury. It is, however, equally applicable to the judgment of a judge sitting at trial without a jury.

The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal. For example, in *R. v. Burke*, [1996] 1 S.C.R. 474, this Court was in a position to identify the deficiencies in the trial judge's analysis of the evidence which led to her unreasonable conclusions in respect of the three counts of indecent assault facing the accused. In that case, Sopinka J. found that the trial judge had ignored the possibility of collusion or corroboration between witnesses before accepting their "strikingly similar" evidence, had not been alive to circumstances (i.e., the absence of physical traces of an alleged indecent assault which, if true, should have left observable marks) which caused great concern about the reliability of evidence adduced in support of allegations of a bizarre nature, and had relied uncritically on unorthodox identification evidence. Similarly, in *R. v. Reitsma*, [1998] 1 S.C.R. 769, rev'g (1997), 97 B.C.A.C. 303, this Court agreed with Rowles J.A., dissenting, that the trial judge had failed to advert to deficiencies in the pre-trial identification procedure and the shortcoming of "in-dock" identification. Finally, in *R. v. O'Connor* (1998), 123 C.C.C. (3d) 487 (B.C.C.A.), at pp. 492-93 and 518-20, the trial judge accepted the accused's evidence that he was not present at the place where the offence was alleged to have been committed, and yet convicted the accused. This logical inconsistency was relied upon by the Court of Appeal to explain the unreasonableness of the verdict. These examples demonstrate that in trials by judge alone, the court of appeal often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion. The court of appeal will therefore be justified to intervene and set aside a verdict as unreasonable when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle, or entered a verdict inconsistent with the factual conclusions reached. These discernable defects are themselves sometimes akin to a separate error of law, and therefore easily sustain the conclusion that the unreasonable verdict which rests upon them also raises a question of law.

[20] Appellate courts will only disturb findings or inferences of fact where the trial judge makes a palpable and overriding error: *R. v. Paquette*, 2019 BCCA 396:

[23] The trial judge's findings of fact and the inferences he drew from the circumstantial evidence are accorded considerable deference on appeal, as they must be reviewed on a standard of palpable and overriding error. An appellate court will not interfere with a judge's findings of fact where there is evidence that supports those findings. Where a judge has misapprehended evidence, the standard is stringent. The misapprehension must go to substance and it must be material to the reasoning of the trial judge. In short, it must have played an essential part "in the reasoning process resulting in a conviction": *R. v. Lohrer*, 2004 SCC 80 at para. 2. As this court noted in *R. v. Swales*, 2014 BCCA 350:

- [49] It is not enough for the appellant to merely suggest a different interpretation of the evidence, or merely point to some evidence which arguably weighs against the trial judge's finding. Mere differences in interpretation on factual matters are not misapprehensions but simple disagreement with the judge's differing view of the evidence.

Circumstantial Evidence - Mens Rea

- [21] The appellant argues that on Counts 1, 2, 3, 5, 6, 7 and 9 the trial judge erred in law by concluding that there was sufficient circumstantial evidence to prove mens rea of the offences beyond a reasonable doubt.
- [22] With respect to the counts of making false statements in a tax return, the appellant argues that the mens rea requires proof that the false statements were made knowingly and intentionally. It is insufficient to show that in making false statements the taxpayer was sloppy, careless, negligent or reckless.
- [23] With respect to tax evasion, the Crown must establish that the accused knew that there was tax imposed; that the accused voluntarily performed an act or engaged in a course of conduct that avoided or attempted to avoid payment of tax owing; that the accused engaged in the conduct for the purpose of avoiding or attempting to avoid payment of tax knowing that avoiding the payment of tax was a virtually certain consequence of his actions.
- [24] The appellant argues that there was insufficient circumstantial evidence to prove mens rea of any offence beyond a reasonable doubt.
- [25] The appellant argues that intentional wrongdoing on the part of the appellant is not the only rational inference that can be drawn from the circumstantial evidence. The appellant argues that the evidence is wholly consistent with innocent inadvertent errors.
- [26] The appellant points to the following factors:
1. This was a family business and the bookkeeping was done by Barbara Isaak. She was not a trained bookkeeper, was required to account for many variables and her bookkeeping was problematic;
 2. The errors in reporting were relatively small in magnitude;
 3. Mr. McDonald testified that his practice where corporate funds are paid to a shareholder is to debit the shareholder loan account accordingly, and that he does not consider such transactions to give rise to taxable income that would be reported on a T1 return;
 4. There were substantial loans owing to Mr. and Mrs. Isaak from Baarak. It is reasonable to infer that when Mr. Isaak deposited corporate funds to his personal account he did so intending that the shareholder loan be debited and that Mrs. Isaak inadvertently failed to record these transactions; that Mr. Isaak was not aware of this error when he provided the records to the accountant to prepare the tax returns.

5. Because Baarak had substantial reported losses it would be absurd to think that Mr. Isaak intentionally failed to report income of Baarak in order to evade taxes. If he had reported the income, they were more than sufficient losses to offset the income, resulting in no tax payable for Baarak.

[27] The appellant makes the following specific arguments:

1. With respect to management fees credited to his shareholder loan account in 2009, Mr. Isaak argues that it is logical to infer that by writing the words SH loan on a deposit slip he intended to have his shareholder loan account reduced rather than increased by the amount of the cheque.
2. He argues that the management fees in 2009 were simply mis-recorded in Baarak's books by Mrs. Isaak.
3. He argues that it is also most logical that when the management fees from the Lockwood's were deposited to the personal account in 2010 he intended to reduce the shareholder loans in doing so.
4. He argues that when the judge concluded this was a not a reasonable explanation for the cheques being deposited to the personal account, "given the absence of any record or documentation that would suggest" it, the trial judge improperly placed the onus of proving his innocence on him, rather than requiring the Crown to disprove the reasonable possibility that the appellant intended to reduce the amount of his shareholder loan account by the amount of these cheques.
5. With respect to the Hydro refund, the appellant argues that the reasonable and more logical innocent explanation is that he expected that his accounting firm would alert him to any issues with respect to depositing the Hydro refund to his personal account and there is no evidence that he was aware of the need for an inquiry with respect to the Hydro refund and intentionally looked the other way to evade taxes.

[28] In essence, the appellant argues with respect to the circumstantial evidence that there were innocent interpretations available to the trial judge and that she erred in concluding that the only reasonable inference to be drawn from the circumstantial evidence was a guilty inference. He argues that the trial judge erred in finding that he had, with respect to the tax evasion charges (counts 3, 6 and 9), knowingly and intentionally failed to report correctly in order to evade tax and with respect to the false or deceptive statements charges (counts 1, 2, 5, and 7), that he made false statements knowingly and intentionally.

[29] I am not persuaded that the trial judge fell into error in her assessment of the circumstantial evidence. I am not persuaded that she made a palpable and overriding error. The evidence does support her findings of fact.

[30] At issue are:

1. The Hydro refund (Counts 1, 7, and 9); and
 2. The management fees paid by the Lockwood's in 2009 and 2010 (Counts 1 to 3, 5, 6, 7 and 9).
- [31] The trial judge was aware and stated clearly that to find guilt on circumstantial evidence alone, the trier of fact must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from circumstantial evidence is that the accused is guilty.
- [32] With respect to the Hydro refund, in 2008 Baarak paid BC Hydro slightly more than \$100,000 as a preliminary charge. Hydro advised that the cost was a preliminary charge that would be re-estimated upon completion and that Hydro would reimburse the difference if costs were found to be less than the estimate. On April 8, 2009 Mr. Isaak was advised by Hydro that the costs were between \$74,000 and \$76,000 and that a refund cheque would be issued to Baarak. Mr. Isaak instructed Hydro to issue the refund cheque to Willi Isaak instead of Baarak. The refund cheque of \$26,481.30 was deposited April 21, 2009 to the Isaak's personal account. Baarak did not report receiving that revenue in its 2009 tax return. It was not reported as income on Mr. Isaak's tax return or Mrs. Isaak's tax return.
- [33] The trial judge considered the rational innocent explanations and rejected them. She addressed the issue of whether Willi may have misunderstood that the Hydro refund was to be included in Baarak's income and said:
- [304] I find on a careful consideration of the evidence that Willi clearly knew that Baarak made the preliminary payment to BC Hydro for the Hydro installation for the pump house. Willi instructed BC Hydro to issue the refund cheque to himself.
- [305] In my opinion, Willi knew that the refund belonged to Baarak. He made a choice not to inquire of McDonald Rickett [his accountants] as to the appropriate treatment of the refund, and instead deposited the refund to his personal bank account. I find that this omission was deliberate
- [34] With respect to the management fees, the trial judge said that Mr. Isaak entered the construction agreement with the Lockwoods on behalf of Baarak. He drafted the terms of the agreement and signed it. He knew that the Lockwoods entered the management agreement with Baarak. He provided the accounts, invoiced the Lockwoods, and collected the fees and GST/HST payable.
- [35] He deposited the Lockwood's \$7,133 cheque to Baarak in August 2009 and described the cheque as a "SH loan" on the deposit slip even though the cheque was issued by Mr. Lockwood to Baarak to pay an invoice for management services.
- [36] The trial judge said that she did not accept the submission that this deposit was erroneously recorded as a shareholder investment in Baarak's general ledger. Mr. Isaak prepared the invoice and knew that the cheque was a progress payment for management services which belong to Baarak. The only conclusion she considered available was that by writing the words "SH loan" on the deposit slip he knew that the funds would be treated as a shareholder

investment and diverted to his shareholder loan account. She concluded that this was not an error but a deliberate choice of wording.

[37] With respect Counts 2, 5 and 7, the Lockwood's issued five cheques to Willi Isaak in 2010 to pay management fees owing to Baarak totaling \$69,077.57. Mr. Isaak prepared the invoices and each invoice contained an instruction that the payment be made to Willi and not to Baarak. Mr. and Mrs. Isaak did not inform their accountants at year-end of these transactions nor did they provide their accountant with their personal banking records. Although the defence argued that this non-reporting was an error by inadvertence, the trial judge found:

[295] I find the "mix-up" with the singular petty cash deposit does not explain why four of the Lockwood's other cheques were deposited into the Issak's personal bank account at different points in time, nor does it explain why these deposits were never recorded in books and records of the Company.

[296] Alternatively, Defence counsel submits that Willi may have deposited the Lockwood's cheques into his Personal Account intending that the shareholder loan account would be appropriately debited, in which case, the deposits would not give rise to taxable income since the shareholder loans far exceeded the amount of the deposits.

[297] I do not accept this submission as a plausible explanation for Willi's conduct. It is speculative at best. Given the absence of any record or documentation that would suggest that Willi had even turned his mind to utilizing his shareholder loans to offset this revenue in this fashion, the only rational and common sense inference that I can draw from the evidence is that Willi never intended to disclose these payments in the books and records of the Company in the first place.

[298] In my opinion, Willi did not "come clean" with CRA in acknowledging the errors made in the tax returns, rather Willi attempted to "clean up" the accounting records once it was apparent that Baarak was being audited.

[299] I note that Defence counsel makes a similar argument with respect to the BC Hydro Refund and I reject this argument on the same reasoning.

[R. v. Isaak, 2019 BCPC 329]

[38] The conclusions that the trial judge drew from the circumstantial evidence were available to her. She was not required to examine each individual circumstance in isolation. The question was whether all of the evidence taken together proved Mr. Isaak's guilt and was inconsistent with any other rational conclusion. She was satisfied that it was. She explained her reasons for reaching that conclusion. That decision was not unreasonable and was supported by the evidence.

- [39] The trial judge did not place the onus of proving his innocence on Mr. Isaak when she rejected the explanation that Mr. Isaak intended to reduce his shareholder loans, she was simply commenting on the evidence before her.

Actus Reus

- [40] With respect to Count 1 (false statement), the appellant argues that the actus reus was not proven because the Crown did not prove beyond a reasonable doubt that Baarak had to report the Hydro refund as income pursuant to s. 9 of the ITA. The Crown did not lead any support for the proposition that a refund of an overpayment constitutes a profit within the meaning of s. 9 of the ITA. The appellant argues that the judge's conclusion that the Hydro refund constituted profit is a clear error of law. The appellant argues that the refund was not required to be included in income of Baarak and accordingly the Crown has not proven tax liability in connection with this amount beyond a reasonable doubt.
- [41] With respect to Count 3 (tax evasion), the appellant says that it is not disputed that management fees constituted income to Baarak in 2009 and 2010.
- [42] The trial judge concluded that the unreported management fees did give rise to at least some tax payable for Baarak's 2010 taxation year. The appellant argues that this is a clear error of law because Baarak was entitled to carry its 2009 losses forward to offset income in 2010. The appellant argues that the Crown failed to establish that the unreported management fees in 2010 exceeded Baarak's available losses and therefore the actus reus of tax evasion in relation to these amounts is not proven.
- [43] With respect to Count 7 (false statement) and 9 (tax evasion), the appellant argues that when the management fees and Hydro refund were deposited to the personal bank account the Crown failed to show that there was a clear-cut obvious indisputable unquestionable shareholder benefit. He argues that both charges require the Crown to prove that there was tax owing by the accused. [Only tax evasion requires proof that tax is owing (Samaroo) but given my conclusions below, nothing turns on this point.] He argues that he had shareholder loans to Baarak significantly greater than the benefits alleged to have been received by him in 2009 in 2010. Although Baarak's general ledgers were not properly updated to show that the amounts deposited to the personal account had the effect of reducing the shareholder loans, he argues that the cases cited establish that these deposits do not give rise to taxable benefits to him. He relies on *Canada v. Franklin*, 2002 FCA 38 [Franklin] and *Dyck v. The Queen*, 2007 TCC 458 [Dyck]. He says that these cases show that there was at least an arguable issue with respect to tax owing by him with respect to these amounts such that the actus reus of tax evasion was not established.
- [44] With respect to Count 1, s. 9 of the ITA defines a taxpayer's income and loss as:

Income

9 (1) Subject to this Part, a taxpayer's income for a taxation year from a business or property is the taxpayer's profit from that business or property for the year.

Loss

(2) Subject to section 31, a taxpayer's loss for a taxation year from a business or property is the amount of the taxpayer's loss, if any, for the taxation year from that source computed by applying the provisions of this Act respecting computation of income from that source with such modifications as the circumstances require.

Gains and losses not included

(3) In this Act, "income from a property" does not include any capital gain from the disposition of that property and "loss from a property" does not include any capital loss from the disposition of that property.

[45] Section 9 does not define profit nor does it provide rules for the computation of profit. Computation of profit involves the offsetting of revenues against the expenditures incurred in earning them: *Canderel Ltd. v. Canada*, [1998] 1 S.C.R. 147 at para. 49 [*Canderel*].

[46] The respondent argues that the initial expense of \$100,063.75 to BC Hydro was recorded in the company's books and records and the accountants relied on it to prepare the year-end financial statements and the 2009 T2 return. The appellant does not dispute this statement of fact but argues that the Crown has not proven that Baarak had to report Hydro refund as income; that the Crown did not prove that a refund of an overpayment constitutes profit.

[47] With respect, this appears to misstate the issue. As *Canderel* states, profit involves offsetting revenues against expenditures incurred in earning them. The BC Hydro expenditure was stated at \$100,063.75. It was not corrected to the lesser amount when the refund was received. As such, expenses were overstated which necessarily reduced profits.

[48] I find no error of law when the trial judge says:

[180] I find that the BC Hydro fee was a necessary and incidental cost of doing business for the building of a pump house for the Uplands Subdivision which was incurred for the purposes of earning income through the sale of lots and the building of homes. Having regard to the general principles discussed in the *Canderel* decision above, I am satisfied that Hydro Refund constitutes revenue that ought to have been reported as taxable corporate income on Baarak's tax return.

[49] The fundamental proposition is this: by overstating expenses, the appellant understated profit, that being revenues set against the expenditures incurred in earning them.

- [50] With respect to Count 3, the appellant's proposition is that it had losses which it could have carried forward to offset income in 2010 and therefore the Crown has failed to establish the actus reus of tax evasion.
- [51] There is no issue that losses from earlier years could be carried forward by the taxpayer. This is in the taxpayer's discretion.
- [52] I agree with the submissions of the respondent that there is no evidence in this case to support the theory that Mr. Isaak as the controlling mind of Baarak intended to claim the company's noncapital losses when it filed the 2010 T2 return. Rather, the trial judge found that Mr. Isaak never intended to disclose these payments in the books and records of the Company in the first place. When the Hydro refund was received, Mr. Isaak chose not to record it in the books and records of Baarak. He chose instead to have it made payable to himself and deposited to his personal joint account.
- [53] As the judge noted, the offence crystallizes at the time the tax returns are filed and not at the time of some future event. Thus, while the taxpayer might have chosen to use losses from other years to offset the income for 2010, it did not do so. The trial judge relied on Dyck, where the court said:
- [11] The taxpayers did not do what they did in 2000 in order to properly reflect an earlier transaction that had been wrongly recorded. Unfortunately taxpayers cannot undo history, or create it ex post facto, when it turns out that they have made a mistake, except in a very limited class of cases where the applicable legislation specifically sanctions it
- [54] I see no error in law in the trial judge's conclusion.
- [55] The appellant makes a similar argument with respect to Counts 7 and 9, effectively that the management fees and Hydro refund which were deposited to his personal bank account does not show a clear benefit to him because his shareholder's loans far exceeded the amount received and could easily have been offset against these amounts, leaving no tax payable.
- [56] Again, this is a ex post facto explanation. Mr. Isaak chose at the time that these amounts were received and deposited to his account to have them made payable to himself personally. He chose not to have them entered into the company's books and records. Once the trial judge's findings are accepted with respect to his activities, the suggestion that she erred in law by finding that there was a clear benefit to him cannot be maintained.
- [57] The appellant relies on two decisions, Franklin and Dyck. In Franklin the trial judge determined that there was no benefit received by the accused:

- [6] Normally, it is for the trier of fact to determine whether a benefit is conferred for purposes of subsection 15(1) (see *Smith v. H.M.Q.*, 99 D.T.C. 5724, at paragraphs 5 and 6 (F.C.A.)). Beaubier J.T.C.C. concluded that what occurred here was a series of bookkeeping errors but that the respondent received no benefit. I am unable to find any palpable or overriding errors in his assessment of the facts that would justify this Court interfering with his decision.
- [58] *Franklin* is one of a series of cases where bookkeeping errors were made. These cases are described in Dyck:
- [8] *Chopp* exemplifies a class of case that may be described as bookkeeping error cases. In those cases, generally a bookkeeping entry is made by someone who does not properly understand the transaction being recorded, with the result that the books of account do not properly reflect the transaction. Typically, the error results in an increase in the balance of a shareholder loan account, because the bookkeeper wrongly assumes that that is what was intended. It is clear that in such cases the shareholder is entitled to have a correcting journal entry made, restoring the balance of the shareholder loan account to what it would have been had the erroneous entry never been made. *Wagar*, 9100-2402 Québec Inc., *Robinson*, and of course *Chopp* itself, are all cases of that sort. In argument, Mr. Christian made it clear that he did not rely on the *Chopp* principle, because there is nothing in the evidence in this case that would support such an argument.
- [9] In *Wagar*, the Court found that erroneous bookkeeping entries had had the effect of inflating the credit balance in the loan account of one of the two shareholders, totally without any complicity by the shareholder. The judge, as I understand it, applied the *Chopp* principle to conclude that there had been no shareholder benefit conferred. In the course of his Reasons, however, he appeared to rely not only on the bookkeeping error, but also on the fact that the shareholder had never withdrawn the funds involved. He said of the loan account balance:

It has been a bookkeeping entry and he has never got any money from it to this date.

They were just book entries that didn't mean anything to the Wagers.

- [10] Two years later, in *Franklin*, this Court held that no shareholder benefit arose where the taxpayer, again the person that controlled the corporation's affairs, sold an asset owned by the company and took the proceeds for his own use. Because he did not tell the bookkeeper about the transaction at all, the decrease in the company's assets was not recorded, nor was any reduction in the company's debt to the shareholder recorded. The decision of this Court, affirmed by a majority in the Court of Appeal, seems to proceed on the basis that it is no benefit to a shareholder to overstate the company's debt to him, so long as the loan account remains in credit balance. In affirming the decision, Rothstein J.A., writing for himself and Sexton J.A., said:

The asset and shareholder's loan accounts of HVSL did not accurately reflect these transactions. However, that does not justify ignoring the fact that no benefit was conferred on the [shareholder] and assessing tax on the basis of financial statements which have been found to be in error.

It was an agreed fact before the trial judge in that case that the proper entries had been made to correct the company's books of account, but not until the facts had been brought to light during the Minister's audit of the company. The Chopp principle, therefore, seems to have been extended to permit the erroneous overstatements of shareholders' credit loan balances to be reversed without adverse tax consequence at any time, so long as the account has remained in credit balance, even though the shareholder was responsible for the failure to record the transaction correctly. These cases were distinguished by Margeson J. in Poushinsky, apparently on the basis that the taxpayer in that case actually made personal use of the funds that had been diverted to him. (at paras. 8-10)

[59] In Dyck, the accountant (mistakenly) advised Mr. Dyck that it would be in his best interest to consolidate his personal account with the account of the company into one investment account which could produce better returns. Some three years later the accountant advised Mr. Dyck that it would be wise to reverse the consolidation of the accounts.

[60] The court said:

[11] this is not a case in which events were either incorrectly recorded, as in Chopp, or not recorded at all, as in Franklin, until sometime later when the books were adjusted to reflect the real transactions. In this case the Dycks, acting on extraordinarily bad advice, entered into a transfer to themselves of the assets of the corporation. That was a real transaction that took place. The transaction in March 2000 was another real transaction. The taxpayers did not do what they did in 2000 in order to properly reflect an earlier transaction that had been wrongly recorded. Unfortunately taxpayers cannot undo history, or create it ex post facto, when it turns out that they have made a mistake, except in a very limited class of cases where the applicable legislation specifically sanctions it. When the balance in the corporate account was transferred to the appellants' joint account the funds became the property of the appellants.

[61] The circumstances here are similar to Dyck. Because of Mr. Isaak's actions the funds were deposited to the Isaak's account. As the judge found, they became the Isaak's funds. This was not due to a bookkeeping error. Mr. Isaak appropriated the funds and did not account for them in his personal returns or in the records of the company or in its returns. They were not accounted for at all, as the judge noted.

[62] Although Mr. Isaak could have used his shareholder loan account to offset these amounts, he did not do so.

[63] The cases do not stand for the proposition that regardless of how it occurs, if there is a shareholders' loan account to offset against the benefit received by the taxpayer (once it is discovered) he cannot be found guilty of tax evasion or of making false statements.

[64] The appeal is dismissed.

"B.J. Brown J."

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