

FEDERAL COURT OF APPEAL

BETWEEN

KHAIR MOHAMMAD DOOSTYAR
sometimes known as
KHAIR MOHAMMAD DOSTYAR

1572680 ONTARIO INC

Appellants

- and -

HIS MAJESTY THE KING

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Appellant. The relief claimed by the Appellant appears on the following page.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the Appellants. The Appellants request that this appeal be heard at (place where Federal Court of Appeal (or Federal Court) ordinarily sits).

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341 prescribed by the Federal Courts Rules and serve it on the Appellants' solicitor, or where the Appellant is self-represented, on the Appellant, **WITHIN 10 DAYS** of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341 prescribed by the Federal Courts Rules instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(Date)

Issued by: _____
(Registry Officer)

Address of local office: _____

TO: Registrar of the Federal Court of Appeal

AND TO: **Attorney General of Canada**
Department of Justice Canada
Tax Law Services Section
99 Bank Street, 11th floor
Ottawa, Ontario
Toronto, Ontario
K1A 0H8

Fax: (613) 941-2293

Per Robert A. Zsigo
E-mail: Robert.Zsigo@justice.gc.ca

Ian Moffatt
E-mail: Ian.Moffatt@justice.gc.ca

Counsel for the Respondent

THE APPELLANTS APPEAL to the Federal Court of Appeal from the order of Justice Sommerfeldt of the Tax Court of Canada, dated December 14, 2023, in which he allowed the Appellants' appeal for only 2010. While His Honour made the finding that the individual Appellant did not misappropriate the substantial amount of \$185,594, as claimed by the Respondent, there was no change in the amount reassessed in the 2012 taxation year for the Appellants.

THE APPELLANTS ASK that the Court set aside the decision of the Tax Court judge relating to the year 2012 and allow the appeal. In the alternative, order that the matter be returned to the trial judge to determine whether the result in 2012 as determined by His Honour, is in accordance with legal principles underlying the invocation of subsection 15(1) of the Income Tax Act (ITA); and

FURTHER, that the Court grant cost in this appeal and in the Tax Court below.

GROUND OF THE APPEAL

Subject to the receipt of the transcripts, the grounds of the appeal are as follows:

1. The Appellant and his corporation were audited by way of an indirect method of assessment, namely, the net worth method;
2. The amounts said to have been reassessed were \$28,319 for 2010, a negative amount of \$37,462 for 2011, and \$159,738 for 2012. These amounts were said to be included in both of the Appellants income under subsection 15(1) of ITA;
3. At the end of the three (3) day trial, the Court issued Oral Reasons allowing the

appeal for 2010. While the Court agreed the amount of \$185,594, shown as an investment by the Appellant styled Duke Investments in 2012, should be removed from the net worth statement as an asset given that the amount was not an appropriation by the individual Appellant (pg. 19 of Transcript of Reasons for Judgment (“TRJ”), that amount was added back to the shareholder’s advance account (pg. 21 of TRJ). This resulted in no change to the material re-assessed amount in 2012;

4. Of note is that although the amount of \$185,594 was the basis for the significant increase in the Appellant’s income in 2012, the conclusion by His Honour that the \$185,594 was not the individual Appellant’s asset, did not in the end, have any impact on the inclusion in the income of the Appellant under subsection 15(1) of the ITA in 2012. This very conundrum was recognized by the trial judge on page 22 of the TRJ;
5. The Respondent in its Reply, relied on two assumptions (Reply 11(f) & 11(g)) that the amount of \$185,594 shown as Duke investment, treated by the Respondent as an asset of the individual shareholder was the basis in 2012 to warrant the reliance on the net worth method. Yet, while the Trial judge’s finding demolished these two significant assumptions for 2012, the result remained unchanged, seemingly, as it was the mechanical result of the net worth method which was likely caused by the bookkeeper’s error;
6. The TRJ was released on November 27, 2023. This was accompanied by an invitation by His Honour that parties may make comments on any typographical,

grammatical, punctuation or similar errors or any omissions. Recognizing that the Court's determination of artificially increasing the shareholder's advance created an injustice, by letter dated December 12, 2023, Counsel for the Appellants wrote to the Court seeking to have the trial re-opened for further submissions on the ground of a misapplication of legal principles pertaining to subsection 15(1) of the ITA. It was the counsel's view that if this were unaddressed, there would be a miscarriage of justice;

7. Previous to that Release of the Oral Reasons on November 27, 2023, the Court's determination of the ending balance of the shareholder's advance account was not known by the parties. However, upon the release of the TRJ on November 27, 2023, it became evident that the Court chose to increase the amount of the shareholder advance account from \$345,277 to \$530,871 which resulted in no impact on the 2012 reassessed amount. Thus, the request by Counsel for the re-opening, given what he viewed as an absurd result given all of the circumstances of the case;
8. His Honour refused Counsel's request to reopen the trial on the ground that there is no provision in the *General Procedure Rules* to grant a reopening. Of note, the Court acknowledged that there was a new argument being suggested relating to the implication of a bookkeeper's error in the determination of an appropriation pursuant to subsection 15(1) of the ITA. Of further note, the final judgment was signed and released on December 14, 2023;
9. Other aspects of the case which point to the injustice and absurdity of the result, include (i) the fact that the Court found the individual Appellant credible (pg. 14

TRJ); (ii) that the corporate sales deposited in the individual's personal bank account were accepted as being used entirely for the corporate business (pg. 13 of TRJ); (iii) that the individual Appellant lived a frugal lifestyle (p 7 of TRJ); (iv) that the Court recognized that the shareholder balance could be attributed to a bookkeeper's error (pgs. 17-18 of TRJ) and (v) the fact that there was no evidence that the Appellant had acquired any other asset in 2012 nor conduct a lifestyle that warranted such a significant infusion of cash;

10. In this appeal, subject to the receipt and review of the transcripts, the Appellants assert that the appeal should be allowed for the following reasons:

- (i) The refusal of the trial judge to re-open the trial to allow for further submissions, especially so where judgment had not been signed, and the particular circumstances demanded an occasion to avoid a miscarriage of justice, was an error of law;
- (ii) While it can be said that this was not a matter of new evidence *per se*, in that there was no additional new documentary evidence to be adduced, the release of His Honour's reasons in which the full impact of the increased shareholder's advance on the net worth assessment was brought to the fore, and the argument by Appellants' Counsel that a miscarriage of justice would result, should have moved the trial judge to re-open the hearing for the limited purpose of ensuring that the increase in the 2012 income was reflective of a true increase in the Appellant's income and unrelated to a bookkeeper's error. This was the fair and just disposition under the particular circumstances of the case;

- (iii) Furthermore, of note is that His Honour recognized that the 2012 taxation year was impacted by the bookkeeper's error which, given the jurisprudence relating to the legal principles underlying subsection 15(1) of the ITA inclusion in income, made the inclusion into the Appellant's income improper; and
- (iv) In any event, the trial judge committed an error of law in the manner in which he dealt with the unchanged tax position in the Appellants 2012 taxation year. Indeed, on the facts of this case, imposing such a significant tax burden on the taxpayers grounded in a net worth assessment pursuant to subsection 15(1) wherein the legal principles underlying such inclusion were absent, constitutes a miscarriage of justice. In particular, the increase in the amount of income for 2012 was not justified, nor was it fair.

11. Section 27(1) of the *Federal Courts Act*; Rules 337, & 337.1, *Federal Courts Rules*; and

12. The Appellants request that the appeal be heard in Toronto, Ontario, Canada.

Date: January 10, 2024



OSBORNE G. BARNWELL
Barrister and Solicitor
515 Consumers Road, Ste. 202
North York, Ontario M2J 4 W9

Osborne G. Barnwell

obarnwell@ogblaw.com
(cc: nbarabash@ogblaw.com)

Tel: 416-773-0309
Fax: 416-773-0909

Lawyer for the Appellants

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NOTICE OF APPEAL

The address for service upon the
Appellant is:

OSBORNE G. BARNWELL
Barrister and Solicitor
515 Consumers Road, Ste. 202
North York, Ontario M2J 4 W9

Osborne G. Barnwell
(LSO No. 34154J)

obarnwell@ogblaw.com
(cc: nbarabash@ogblaw.com)
Tel: 416-773-0309
Fax: 416-773-0909

Counsel of the Appellant