Federal Court of Appeal  Cour d'appel fédérale

Date: 20150223

Docket: A-170-14

Citation: 2015 FCA 52

CORAM: **NADON J.A.**
WEBB J.A.
BOIVIN J.A.

BETWEEN:

PAUL MATTHEW JOHNSON

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on November 27, 2014.

Judgment delivered at Ottawa, Ontario, on February 23, 2015.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NADON J.A.
BOIVIN J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from a decision of the Tax Court of Canada (Tax Court of Canada Docket: 2012-4902(GST)G) striking the paragraphs from Mr. Johnson's notice of appeal to that court related to the alleged purpose of the Minister of National Revenue (Minister) in issuing an assessment under Part IX of the Excise Tax Act, R.S.C. 1985, c. E-15 (the Act), the conduct of the Minister in relation to the assessment and the collection of amounts under that assessment, and the delay in addressing Mr. Johnson's notice of objection.

[2] Mr. Johnson had also appealed the decision of the Federal Court (2013 FC 1032) dismissing his application for judicial review of the decisions of the Minister related to these assessment and collection actions. The alleged misconduct of the Minister was the same misconduct as described in the paragraphs that were struck by the Tax Court Judge from the notice of appeal to the Tax Court of Canada. The citation for the Judgment and reasons in relation to the appeal from the decision of the Federal Court Judge is 2015 FCA 51. The facts are set out in those reasons.

[3] In *Main Rehabilitation Co.* v. *R.* (2004 FCA 403, 247 D.L.R. (4th) 597) (leave to appeal to the Supreme Court of Canada dismissed ([2005] S.C.C.A. No. 37)), this Court made the following comments:

> 6 In any event, it is also plain and obvious that the Tax Court does not have the jurisdiction to set aside an assessment on the basis of an abuse of process at common law or in breach of section 7 of the Charter.
>
> 7 As the Tax Court Judge properly notes in her reasons, although the Tax Court has authority to stay proceedings that are an abuse of its own process (see for instance *Yacyshyn v. R.* (1999), 99 D.T.C. 5133 (Fed. C.A.)), Courts have consistently held that the actions of the CCRA cannot be taken into account in an appeal against assessments.
>
> 8 This is because what is in issue in an appeal pursuant to section 169 is the validity of the assessment and not the process by which it is established (see for instance the *Consumers' Gas Co. v. R.* (1986), 87 D.T.C. 5008 (Fed. C.A.) at p. 5012). Put another way, the question is not whether the CCRA officials exercised their powers properly, but whether the amounts assessed can be shown to be properly owing under the Act (*Ludco Enterprises Ltd./Entreprises Ludco Ltée v. R.* (1994), [1996] 3 C.T.C. 74 (Fed. C.A.) at p. 84).

[4] The issue for the Tax Court of Canada in this case will be to determine whether each assessment issued under the Act and that is under appeal to that Court properly reflects the correct amount of net tax owing pursuant to that Act by the person who was assessed. The

motivation of the Minister in issuing such assessments or any collection action taken by the Minister in relation to such assessments is not relevant to this inquiry.

[5] In paragraph 25 of his decision, the Tax Court Judge described the paragraphs that he was striking from the notice of appeal as follows:

- Paragraph 19 relates to the administrative act of the Minister setting up a GST account and collection actions of the Minister
- Paragraphs 22, 23, 28, 32 and 33 relate to collection actions of the CRA
- Paragraph 37 relates to the amount of time the Minister took to address the Appellant's notice of objection and collection actions of the Minister
- Paragraphs 43 and 44 relate to a purported abuse of process with respect to the issuance of the Notice of Assessment. Also, when read with the pleaded facts, the paragraphs relate to the collection actions of the CRA.

[6] Mr. Johnson can challenge whether there was a partnership, the members thereof (if there was a partnership), and the taxable supplies made in the particular reporting periods. These are all matters that could be addressed by the Tax Court of Canada in determining whether the assessments issued reflect the correct amount owing under the Act by the person who was assessed. However, any collection action taken by the Minister is not relevant in determining whether the assessments (upon which the collection action would be based) are correct.

[7] I agree with the conclusion of the Tax Court Judge that the paragraphs referred to above should be struck from the notice of appeal to that court.

[8] Mr. Johnson also appeals the decision of the Tax Court Judge to grant the Crown an extension of time to file a reply. Mr. Johnson had also requested judgment in default or alternatively for an order that the allegations of fact in the notice of appeal are presumed to be true. The basis for these requests was that the Crown had not filed a reply within the time prescribed by the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688, (Rules) for doing so.

[9] Mr. Johnson refers to Rules 44 and 63 of the Rules which, in part, provide as follows:

> 44.(1)A reply shall be filed in the Registry within 60 days after service of the notice of appeal unless
>
> > (*a*) the appellant consents, before or after the expiration of the 60-day period, to the filing of that reply after the 60-day period within a specified time; or
> >
> > (*b*) the Court allows, on application made before or after the expiration of the 60-day period, the filing of that reply after the 60-day period within a specified time.
>
> (2) If a reply is not filed within an applicable period specified under subsection (1), the allegations of fact contained in the notice of appeal are presumed to be true for purposes of the appeal.
>
> …
>
> 63.(1) If a reply to a notice of appeal has not been filed and served within the applicable times specified under section 44, the appellant may apply on motion for judgment in respect of the relief sought in the notice of appeal.
>
> (2) On the return of the application for judgment, the Court may
>
> > (*a*) direct that the appeal proceed to hearing; or
> >
> > (*b*) allow the appeal if the facts alleged in the notice of appeal entitle the appellant to the relief sought; and

> (*c*) give such other direction as is just, including direction regarding the payment of costs.

[10] The reply was not filed within the 60 day period referred to in Rule 44. The Tax Court Judge granted an extension of time to file the reply, as provided in paragraph 44 (1) (b) of the Rules. This was a discretionary decision of the Tax Court Judge. As noted by this Court in *Prasad v. Canada (Minister of Employment and Social Development)*, 2015 FCA 22:

> 6 This Court can only interfere with the Judge's discretionary decision if he proceeded on a wrong principle of law, gave insufficient weight to relevant factors, misapprehended the facts or where an obvious injustice would otherwise result (See *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374 at para 15).

[11] In this case, there is no basis upon which to interfere with the Tax Court Judge's discretionary decision to grant an extension of time to file the reply.

[12] In *The Queen v. Interior Savings Credit Union*, 2007 FCA 151, [2007] F.C.J. No. 526, Noël J.A. (as he then was), writing on behalf of this court, stated that:

> 37 As was noted by Paris J. in *Telus Communications (Edmonton) Inc. v. R. (No. 2)*, [2003] G.S.T.C. 183-1 (at paras. 5 and 6):
>
> > The reference in subsection 44(2) to "an applicable period specified under subsection (1)" relates to any one of three periods, namely: within 60 days after the service of the Reply, within the period specified in a consent given by the Appellant, or within the period allowed by the Court for the filing of the Reply.
> >
> > This means that subsection 44(2) only applies if a Reply is filed outside the sixty-day period and the Appellant does not consent or where there is no order of the court extending that period. Given my order extending the time period for filing a Reply, subsection 44(2) does not apply.

> 38 I agree with Paris J.'s reading of subsection 44(2). Given that in this case, Little J. did extend the period within which the Reply could be filed, there was no basis for the issuance of an order that the allegations of fact in the Notice of Appeal be presumed to be true.

[13] Therefore, the granting of the extension of time to file the reply nullified any right that Mr. Johnson may have had to have an order issued to presume the facts alleged in the notice of appeal to be true.

[14] Rule 63 also provides that an appellant can only apply for a motion for judgment if "a reply to a notice of appeal has not been filed and served within the applicable times specified under section 44" (emphasis added). The reference to the plural "times" clearly indicates that this Rule only applies under the same conditions as noted above for subsection 44(2) of the Rules. The granting of the extension of time by the Tax Court Judge provided a new time for filing the reply under Rule 44 and nullified the right of Mr. Johnson granted by Rule 63 to "apply on motion for judgment in respect of the relief sought in the notice of appeal".

[15] As a result, I would dismiss, with costs, the appeal from the order of the Tax Court Judge striking certain paragraphs from the notice of appeal and dismissing Mr. Johnson's motion for the orders that he was seeking.

"Wyman W. Webb"

J.A.

“I agree

M. Nadon J.A.”

“I agree

Richard Boivin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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