

Federal Court of Appeal



Cour d'appel fédérale

Date: 20141215

Docket: A-430-13

Citation: 2014 FCA 297

**CORAM: DAWSON J.A.
STRATAS J.A.
NEAR J.A.**

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

**CONOCOPHILLIPS CANADA
RESOURCES CORP.**

Respondent

Heard at Toronto, Ontario, on November 24, 2014.

Judgment delivered at Ottawa, Ontario, on December 15, 2014.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**STRATAS J.A.
NEAR J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20141215

Docket: A-430-13

Citation: 2014 FCA 297

**CORAM: DAWSON J.A.
STRATAS J.A.
NEAR J.A.**

BETWEEN:

MINISTER OF NATIONAL REVENUE

Appellant

and

**CONOCOPHILLIPS CANADA
RESOURCES CORP.**

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

[1] The genesis of this appeal is a dispute between the Minister of National Revenue and the respondent taxpayer ConocoPhillips Canada Resources Corp. about whether a notice of reassessment in respect of ConocoPhillips' tax year ending November 30, 2000 was mailed to ConocoPhillips on November 7, 2008. The Minister takes the position that the notice of reassessment was so mailed. ConocoPhillips takes the position it was not.

[2] The dispute is of signal importance to ConocoPhillips. Under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act), income tax assessments are deemed to be valid and binding unless varied or vacated on an objection or appeal (subsection 152(8)). In order to object to an assessment, a taxpayer must serve a notice of objection on the Minister within a specified timeframe; in the present case the notice of objection was required to be served within 90 days of the date on which the notice of reassessment was mailed (subsection 165(1)). On receipt of a notice of objection, the Minister is obliged, with all due dispatch, to “reconsider the assessment and vacate, confirm or vary the assessment or reassess,” and to notify the taxpayer in writing of the Minister’s action (subsection 165(3)). If the Minister has not confirmed, vacated or varied the assessment within 90 days of receiving the notice of objection, the taxpayer may appeal the assessment to the Tax Court of Canada (subsection 169(1)).

[3] In the present case, ConocoPhillips states that it first learned of the reassessment on April 14, 2010. On June 7, 2010, it filed a notice of objection. In response, the Minister’s delegate advised that he would not consider the objection on the ground that it was untimely.

[4] On October 15, 2010, ConocoPhillips filed a notice of application in the Federal Court seeking judicial review of the Minister’s delegate’s decision not to consider the notice of objection. For reasons cited as 2013 FC 1192, a judge of the Federal Court allowed the application for judicial review and set aside the decision not to consider the objection. In the Judge’s view, the Federal Court had jurisdiction to entertain the application and the decision of the Minister’s delegate was unreasonable.

[5] This is an appeal from that decision.

[6] For the reasons that follow, I have concluded that the Federal Court lacked jurisdiction to entertain the application for judicial review. It follows that I would allow the appeal on the basis set out below.

[7] Section 18.5 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 insulates from judicial review a decision of a federal board, commission or other tribunal if an Act of Parliament expressly provides for an appeal to, among other courts, the Tax Court.

[8] In the present case, ConocoPhillips' proper recourse was to commence an appeal to the Tax Court under paragraph 169(1)(b) of the Act and to demonstrate in that appeal that its notice of objection was filed on a timely basis. It is within the jurisdiction of the Tax Court to determine whether the notice of reassessment was in fact mailed as the Minister alleges. This it will do on a full evidentiary record with regard to the statutory presumption found in subsection 244(14) of the Act (which presumes a notice of reassessment to have been mailed on its date). See: *Walker v. Canada*, 2005 FCA 393, 344 N.R. 169, at paragraphs 11 to 13. It is open to ConocoPhillips to request that the question of the timeliness of its notice of objection be determined before the trial pursuant to Rule 58(1) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a.

[9] At paragraph 8 of his reasons, the Federal Court Judge expressed the view that paragraph 169(1)(b) of the Act did not apply because "the conditions precedents [*sic*] do not exist". To similar effect, in this Court ConocoPhillips argues that it is entitled to have the

Minister reconsider the notice of reassessment on the ground that subsection 165(3) obliges the Minister to reconsider an assessment “with all due dispatch” when served with a notice of objection. ConocoPhillips argues that the only way that it can have its right to reconsideration respected is by having the Federal Court resolve the timeliness issue and, if resolved in ConocoPhillips’ favour, ordering the Minister to reconsider under subsection 165(3) of the Act.

[10] It is uncontroversial that subsection 165(3) obliges the Minister to reconsider an assessment when served with a notice of objection. The flaw in ConocoPhillips’ position is that the ministerial obligation is triggered only when a notice of objection is served within the time frame mandated by the Act. ConocoPhillips cannot argue that the Minister’s failure to consider a notice of objection that may or may not have been filed on a timely basis takes ConocoPhillips out of the statutory scheme contained in the Act and out of the specialized expertise of the Tax Court. This argument begs the question as to the proper forum to determine if, or when, the notice of reassessment was mailed, and when the time for filing a notice of objection expired.

[11] Without expressing any opinion on the timeliness issue, should the Tax Court find the notice of objection was in fact filed on a timely basis the Minister will be under a legally enforceable duty to reconsider the notice of reassessment. The Tax Court may facilitate this by adjourning or staying the appeal.

[12] For these reasons, the Federal Court erred by finding that a condition precedent to the operation of paragraph 169(1)(b) was not met.

[13] It follows that I would allow the appeal with costs. Pronouncing the judgment the Federal Court ought to have pronounced, I would dismiss the application for judicial review with costs in the Federal Court.

“Eleanor R. Dawson”

J.A.

“I agree.

David Stratas J.A.”

“I agree.

D. G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-430-13

STYLE OF CAUSE: MINISTER OF NATIONAL
REVENUE v. CONOCOPHILLIPS
CANADA RESOURCES CORP.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 24, 2014

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: STRATAS J.A.
NEAR J.A.

DATED: DECEMBER 15, 2014

APPEARANCES:

Josée Tremblay
Shane Aikat

FOR THE APPELLANT

Al Meghji
Martha MacDonald

FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney
Deputy Attorney General of Canada

FOR THE APPELLANT

Osler, Hoskin and Harcourt LLP
Barristers and Solicitors
Toronto, Ontario

FOR THE RESPONDENT