Federal Court of Appeal | Cour d'appel fédérale

Date: 20130206
Docket: A-478-12

Citation: 2013 FCA 22

Present: MAINVILLE J.A.

BETWEEN:

ANDRÉ RODRIGUE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on February 6, 2013.

REASONS FOR ORDER BY: MAINVILLE J.A.

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REASONS FOR ORDER

MAINVILLE J.A.

[1] This is a motion by the respondent to dismiss the appeal on the ground that the impugned order of the Tax Court of Canada is an interlocutory judgment and that the notice of appeal was filed after the 10-day time limit provided at paragraph 27(2)(*a*) of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[2] The appellant is challenging this motion on the ground that the order of the Tax Court of Canada is either a judgment on a question of law determined before trial or a final judgment that may be appealed from the filing of a notice of appeal within 30 days after the pronouncement of

the judgement under paragraph 27(2)(*b*) of the *Federal Courts Act*. In the alternative, the appellant is seeking an extension of time to file his notice of appeal should the Court be of the opinion that the impugned order is an interlocutory judgment.

[3] Two other appeals, namely, dockets A-479-12, *Animalerie Dyno Inc. c. Sa Majesté la Reine*, and A-480-12, *Micheline Rodrigue c. Sa Majesté la Reine*, are the subject of two similar motions from the respondent: these, too, have been challenged by the appellants in question, on similar grounds to those raised in the present case. Since the factual background and the legal arguments pertaining to the three motions regarding these related files, A-478-12, A-479-12 and A-480-12, are identical, the present reasons for order, for docket A-478-12, will also dispose of the respondent's motions regarding appeal dockets A-479-12 and A-480-12.

BACKGROUND

[4] On June 21, 2012, the appellant filed a notice of appeal with the Tax Court of Canada regarding tax assessments for the taxation years 1995 to 1998. On September 10, 2012, the respondent served a reply to this notice of appeal. Since the reply was late, on September 21, 2012, the respondent filed and served a motion with the Tax Court of Canada seeking an extension of time to file a reply to the notice of appeal.

[5] The appellant opposed the motion by filing and serving written representations with the Tax Court of Canada on October 11, 2012. In his written representations, the appellant asked the Tax Court of Canada (a) not to dispose of the application upon consideration of written

representations and without appearance by the parties, but rather to order that a hearing be held to dispose of the motion, and (b) to order that the respondent's representative be cross-examined on his affidavit in support of the respondent's motion for an extension of time prior to the desired hearing of the motion.

[6] In reply to these pleadings, counsel for the respondent wrote to counsel for the appellant on October 15, 2012, to inform him of the following:

> [TRANSLATION]
> In your [written representations], you request that these motions be the subject of a hearing, during which, among other things, you wish to cross-examine us on affidavit. We will be available for cross-examination on the date of the hearing to be scheduled by the Court unless you wish to send us written examination questions in the meantime.
> (Reply Record, Tab 5)

[7] On October 19, 2012, after reviewing the respondent's motion record and the appellant's written representations, Justice Favreau of the Tax Court of Canada issued an order allowing the respondent's motion for an extension of time to file a reply to the notice of appeal.

[8] The appellant therefore wrote to Justice Favreau on October 22, 2012, to explain the situation to him and to ask him to confirm the examination of the deponent and the opportunity to make representations following the filing of the examination [TRANSLATION] "before a decision regarding the respondent's motions for an extension of time to file a reply to the notice of appeal is made": Reply Record, Tab 8). The respondent replied on October 29, 2012, stating that, obviously, Justice Favreau had recognized implicitly that the examination on affidavit

sought by the appellant was neither necessary nor warranted, and that the appellant's only remedy was an appeal before this Court.

[9] On November 30, 2012, Chief Justice Rip of the Tax Court of Canada informed the parties that the motion had been decided and that the appellant could file a notice of appeal with this Court.

COMPUTING THE TIME TO APPEAL

[10] Subsection 27(1.1) of the *Federal Courts Act* deals with appeals from Tax Court of Canada judgments issued under that court's general procedure.

(1.1) An appeal lies to the Federal Court of Appeal from

(*a*) a final judgment of the Tax Court of Canada, other than one in respect of which section 18, 18.29, 18.3 or 18.3001 of the *Tax Court of Canada Act* applies;

(*b*) a judgment of the Tax Court of Canada, other than one in respect of which section 18, 18.29, 18.3 or 18.3001 of the *Tax Court of Canada Act* applies, on a question of law determined before trial; or

(*c*) an interlocutory judgment or order of the Tax Court of Canada, other than one in respect of which section 18, 18.29, 18.3 or 18.3001 of the *Tax Court of Canada Act* applies.

(1.1) Sauf s'il s'agit d'une décision portant sur un appel visé aux articles 18, 18.29, 18.3 ou 18.3001 de la *Loi sur la Cour canadienne de l'impôt*, il peut être interjeté appel, devant la Cour d'appel fédérale, des décisions suivantes de la Cour canadienne de l'impôt :

a) jugement définitif;

b) jugement sur une question de droit rendu avant l'instruction;

c) jugement ou ordonnance interlocutoire.

[11] Subsection 27(2) of the *Federal Courts Act* provides the time limits within which such appeals must be brought, distinguishing here between (a) interlocutory judgments, notice of appeal from which must be filed within 10 days after the pronouncement of the judgment at issue, and (b) other judgments, notice of appeal from which must be filed within 30 days. In all cases, a judge of this Court may extend the time limit:

(2) An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal

(*a*) in the case of an interlocutory judgment, within 10 days after the pronouncement of the judgment or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 10 days; and

(*b*) in any other case, within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days.

(2) L'appel interjeté dans le cadre du présent article est formé par le dépôt d'un avis au greffe de la Cour d'appel fédérale, dans le délai imparti à compter du prononcé du jugement en cause ou dans le délai supplémentaire qu'un juge de la Cour d'appel fédérale peut, soit avant soit après l'expiration de celui-ci, accorder. Le délai imparti est de :

a) dix jours, dans le cas d'un jugement interlocutoire;

b) trente jours, compte non tenu de juillet et août, dans le cas des autres jugements.

[12] The question, therefore, is whether an order of the Tax Court of Canada extending the time for filing a reply to a notice of appeal from an income tax assessment is an interlocutory judgment that may be appealed from within 10 days, or a final judgment or a judgment on a question of law determined before trial that may be appealed within 30 days.

[13] The appellant submits that (a) the right whether or not to file a late reply to a notice of appeal and (b) observance of the *audi alteram partem* rule are both questions of law. The appellant is of the view that Justice Favreau's order is a judgment on a question of law determined before trial and that it may, therefore, be appealed from within 30 days after the pronouncement of the judgment under paragraphs 27(1.1)(*b*) and 27(2)(*b*) of the *Federal Courts Act*. The appellant adds that the effect of this order is such that it is also a final judgment within the meaning of paragraph 27(1.1)(*a*) of the *Federal Courts Act*.

[14] I do not agree with the appellant on these points.

[15] Section 2 of the *Federal Courts Act* defines a "final judgment" as a decision that determines any substantive right of at least one of the parties in controversy in any judicial proceeding:

2. (1) In this Act,	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
...	[…]
"final judgment" means any judgment or other decision that determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;	« jugement définitif » Jugement ou autre décision qui statue au fond, en tout ou en partie, sur un droit d'une ou plusieurs des parties à une instance.

[16] This Court has explained many times that this definition of "final judgment" does not include the "right" to file a document in a proceeding after the time limit for doing so has expired (*Canada (Attorney General) v. Hennelly* (1995), 99 F.T.R. 320 n, 185 N.R. 389) or the "right" to

amend pleadings during proceedings (*Simpson Strong-Tie Co. v. Peak Innovations Inc.*, 2008 FCA 235), insomuch as the decision at issue does not determine any substantive rights of any of the parties to the proceeding.

[17] Moreover, even though a judgment on a question of law determined before trial may be appealed from within 30 days under paragraph 27(1.1)(*b*) of the *Federal Courts Act*, that judgment must be one that has determined a substantive right of any of the parties to the proceeding and not one that dealt with a procedural issue or the conduct of the proceeding.

[18] Even though decisions dealing with procedural issues or the conduct of a proceeding often deal with questions of law regarding the proceeding in question, they are not judgments on a question of law determined before trial within the meaning of paragraph 27(1.1)(*b*) of the *Federal Courts Act*, as long as they are not concerned with the parties' rights with respect to the merits of the case.

[19] I recognize that it may sometimes be difficult to distinguish between a decision regarding the merits of a case and a decision regarding a procedural issue or the conduct of a proceeding. There is no reason, however, for getting lost in the finer points of the law to dispose of this issue when it arises. A pragmatic, functional approach is in order. The main issue to decide is whether the impugned judgment or decision disposes of a substantive or a procedural issue.

[20] In the case at bar, I have no hesitation in finding that Justice Favreau's order disposes of a procedural issue and not a substantive one. The substantive issue in this case, namely, the accuracy of the appellant's income tax assessments for the years at issue, is not affected by the order.

[21] Consequently, the time provided for appealing the Tax Court of Canada order dated October 19 is 10 days after the day the order was pronounced. The appellant missed that deadline.

EXTENSION OF THE TIME TO APPEAL

[22] Whether or not to extend the time to appeal under subsection 27(2) of the *Federal Courts Act* comes within the discretion of the judge hearing the motion. The underlying consideration in exercising this discretion is whether it is fair and reasonable to extend the time in the light of all the circumstances. For that purpose, this Court has identified certain factors that may be considered, including (a) whether there has been a continuing intention to appeal; (b) whether the appellant has provided a reasonable explanation for the delay in filing the notice to appeal; (c) whether another party has been prejudiced by the delay; and (d) whether a serious issue is raised on appeal: *Canada Trustco Mortgage Co. v. Canada*, 2008 FCA 382, 382 N.R. 388, at para. 14; *Leo-Mensah v. Canada*, 2012 FCA 221, 434 N.R. 312, at para. 8.

[23] On the face of the motion record and the reply record, it is clear that, in the present case, it has been the appellant's continuing intention to appeal. The appellant's explanation in

justification of the delay in filing the notice of appeal is reasonable: the appellant tried in vain to obtain an alternative solution from the Tax Court of Canada to solve the issue.

[24] Moreover, it is not disputed that the respondent suffered no serious prejudice as a result of the appellant's delay in filing the notice of appeal.

[25] It therefore remains to be decided whether the appeal raises a serious issue. A Tax Court of Canada judge's decision whether or not to allow a motion for an extension of time to file a reply to a notice of appeal is also discretionary. Only on rare occasion will this Court interfere with such a discretionary decision. If it was the only issue raised by the appellant in support of his appeal, I would not hesitate to deny the extension of the time to appeal. However, in my opinion, the appellant raises a more serious issue.

[26] This serious issue regards the interpretation and enforcement of subsection 67(1) and sections 69 and 74 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a. They provide as follows:

67. (1) The notice of motion together with the affidavits or other documentary material to be used at the hearing of the motion shall be served on any person or party who will be affected by the direction sought.	**67.** (1) L'avis de requête et les déclarations sous serment ou autres éléments de preuve documentaire qui seront utilisés lors de l'audition de la requête sont signifiés aux personnes ou aux parties sur lesquelles la directive demandée peut avoir une incidence.
69. (1) A party filing a notice of motion may, at the same time, or subsequently, file a written request that the motion be disposed of upon consideration of written representations and without appearance by the parties.	**69.** (1) La partie qui dépose un avis de requête peut, au moment du dépôt ou par la suite, présenter une demande écrite pour que la requête soit tranchée sur la base des

observations écrites et sans comparution des parties.

(2) A copy of the request and of the written representations shall be served on all parties served with the notice of motion.

(2) Une copie de la demande et des observations écrites doit être signifiée à toutes les parties visées par l'avis de requête.

(3) A party served with a request shall within twenty days,

(*a*) file and serve written representations in opposition to the motion, or

(*b*) file and serve a written request for a hearing.

(3) Une partie à qui la requête a été signifiée dispose de vingt jours pour

a) produire et signifier des observations écrites en opposition à la requête;

b) déposer et signifier une demande écrite d'audience.

(4) When all parties served with the request have replied to it or the time for doing so has expired, the Court may,

(*a*) grand judgment without a hearing,

(*b*) direct a hearing, or

(*c*) direct that written representations be filed.

(4) Lorsque toutes les parties à qui la requête a été signifiée ont donné leur réponse ou que le délai est expiré, la Cour peut

a) accorder le jugement sans audience;

b) ordonner la tenue d'une audience;

c) ordonner le dépôt d'observations écrites.

74. A deponent whose affidavit has been filed may be cross-examined on it by a party who is adverse in interest on the motion, and the evidence adduced may be used at the hearing of the motion.

74. Le déposant d'une déclaration sous serment peut être contre-interrogé au sujet de la déclaration sous serment par une partie opposée à la requête, et le témoignage qui en découle peut être utilisé lors de l'audition de la requête.

[27] The issue in this appeal is, therefore, whether a Tax Court of Canada judge may, under section 69, cited above, determine that the sought-after cross-examination of a deponent, as provided for by section 74, cited above, is neither necessary nor warranted for the purpose of disposing of a motion upon consideration of written representations and without appearance of the parties. That is a serious issue.

CONCLUSIONS

[28] Even though the Court may allow the respondent's motion and also allow the appellant to file a new notice of appeal within 10 days of the order, section 3 of the *Federal Courts Rules*, SOR/98-106, encourages this Court to secure the just, most expeditious and least expensive determination of every proceeding on its merits. In the light of these principles, it seems most just, simple and expeditious, and least expensive, in the interest of the proper administration of justice, to (a) dismiss the respondent's motion; (b) allow the motion for an extension of time to appeal the order of the Tax Court of Canada; (c) order that the amended notice of appeal filed with the Registrar on November 29, 2012, be accepted as an extended notice of appeal; and (d) order that the time limits to perfect the appeal in accordance with the *Federal Courts Rules* be established and computed as of the date of the present order. In light of the circumstances and of section 105 of the *Federal Courts Rules*, the appeals in dockets A-478-12, A-479-12 and A-480-12 will be consolidated in accordance with the terms of the order issued concurrently with these reasons. With costs in the cause.

"Robert M. Mainville"

J.A.

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-478-12
STYLE OF CAUSE:	André Rodrigue v. Her Majesty the Queen

DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	MAINVILLE J.A.
DATED:	February 6, 2013

WRITTEN REPRESENTATIONS:

Bernard Roy Québec, Quebec	FOR THE APPELLANT
Pierre Cossette Montréal, Quebec	FOR THE RESPONDENT

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