Date: 20061026

Docket: A-622-05

Citation: 2006 FCA 352

CORAM: **NOËL J.A.**
EVANS J.A.
MALONE J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

236130 BRITISH COLUMBIA LTD

Respondent

Heard at Vancouver, British Columbia, on October 25, 2006.

Judgment delivered at Vancouver, British Columbia, on October 26, 2006.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: EVANS J.A.
MALONE J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from the Order of Bell J. of the Tax Court of Canada (2005 TCC 770), who held, further to a reference made under section 173 of the *Income Tax Act* (the "Act"), that the reassessments issued with respect to the respondent's 1995 and 1996 taxation year were issued after the applicable limitation period had expired.

The facts

[2] The following brief summary outlines the salient facts which led to the reference. After filing waivers pursuant to subparagraph 152(4) (a) (ii) of the Act for the 1995 and 1996 taxation years, the respondent filed Notices of Revocation on November 2, 2001. As a result, the limitation period to reassess those two years elapsed six months thereafter, on May 2, 2002.

[3] Notices of reassessment bearing the date April 8, 2002 were first mailed to the appellant presumably on that date. However, they were mailed to an erroneous address in Richmond, B.C. as a result of a mistake by an official of the Canada Revenue Agency ("CRA") who entered into the computer system another corporations mailing address for that of the respondent.

[4] The Notices of Reassessment were returned to the CRA and stamped received on April 22, 2002. The appellant produced evidence establishing that, based on the procedure in place, the reassessments would have been mailed out again by April 29 or 30, 2002.

[5] However, when they were mailed out again, the reassessments were sent to the "Books and Records" address indicated on the respondent's income tax return in which, the postal code had been improperly inscribed by the respondent. The evidence revealed that, without checking the respondent's returns, a clerk had entered into the computer system the erroneous Books and Records' address as the respondent's mailing address.

[6] The reassessments were received by the respondent by May 17, 2002 at the latest. There is no evidence as to the exact date.

[7] In the appeal which ensued, the respondent alleged, amongst other things, that the reassessments were invalid since they had been issued out of time.

[8] The parties subsequently agreed to refer to the Tax Court of Canada the question whether the reassessments had been made on time (i.e., before May 3, 2002). On December 8, 2005, Bell J. ruled that the reassessments were statute barred.

[9] This is the decision under appeal.

<u>Statutory provisions</u>

[10] It is useful at this stage to set out the two statutory presumptions which operate in favour of the Minister when an assessment is sent by mail. Subsection 244(14) reads, in part, as follows :

For the purposes of this Act, where any … notice of assessment … is mailed, it shall be presumed to be mailed on the date of that notice …	Pour l’application de la présente loi, la date de mise à la poste […] d’un avis de cotisation […] est présumée être la date apparaissant sur cet avis […]

[11] Subsection 244(15) reads, in part, as follows :

Where any notice of assessment … has been sent by the Minister, as required by this Act, the assessment … is deemed to have been made on the day of mailing of the notice of the	Lorsqu’un avis de cotisation […] a été envoyé par le ministre comme le prévoit la présente loi, la cotisation est réputée avoir été établie […] à la date de mise à la poste de l’avis de

assessment …	cotisation […]

Decision of the Tax Court Judge

[12] The Tax Court Judge first noted that the onus of demonstrating that the reassessments were mailed on time rested with the Minister. However, he acknowledged that in an organization such as the CRA, it is impossible to produce direct evidence of the date of mailing of a particular document and that the appropriate method of proof is that set out in *Schafer v. The Queen*, [1998] GSTC 60 (TCC) *(Schafer,)* as applied by this Court in *Kovacevic v. The Queen*, [2003] GSTC 112 (FCA) (*Kovacevic*).

[13] In *Schafer*, Bowman J. (as he then was) enunciated the test as follows:

> [23] In a large organization, such as a government department, a law or accounting firm or a corporation, where many pieces of mail are sent out every day it is virtually impossible to find a witness who can swear that he or she put an envelope addressed to a particular person in the post office. The best that can be done is to set out in detail the procedures followed, such as addressing the envelopes, putting mail in them, taking them to the mail room and delivering the mail to the post office.

[14] In *Kovacevic*, this Court gave this statement the following qualified approval:

> [16] I accept that when legislation requires that documents be sent by a large organization such as a government department by ordinary mail, but does not require registered or certified mail or evidence of a more formal means of sending, the observation [of the Tax Court] in *Schafer* is reasonable. Generally it would be sufficient to set out in an affidavit from the last individual in authority who dealt with the document before it entered the normal mailing procedures of the office, what those procedures were.

[15] The Tax Court Judge appeared to accept the Crown’s evidence that, in the normal course, the procedure in place with respect to returned mail should have led to the Notices being mailed out

on time. However, he found, that he could not rely on this evidence in this instance since the evidence shows that the reassessments were again sent to a wrong address.

[16] In particular he said:

> [48] When the Notices of Assessment were mailed a second time to the Appellant, the address to which they were sent was the mistaken address furnished by the Appellant to Revenue. That was the Books and Records address which was identical to the Head Office address except that the postal code of the Books and Records address was incorrect. The evidence of Revenue officers was that all three addresses were displayed on a screen and that, obviously, the incorrect address was selected. Even though the Appellant furnished that address to the Respondent, the decision to select the Books and Records address with the wrong postal code exhibited another lack of care on behalf of Revenue. An incorrect address, entered on the system by Revenue, having been used on the original mailing, more time and care should have been taken to ensure the correct address was used on the second mailing. Two identical municipal addresses with different postal codes should have caught Revenue's attention and should have resulted in selection of the correct address.

[17] In the end, the Tax Court Judge held that the Minister had failed to establish on a balance of probabilities that the Notices of reassessment had been remailed prior to May 3, 2002.

Alleged errors

[18] The appellant submits that the Tax Court Judge erred in concluding that the Minister had not satisfied its onus of proving, on a balance of probabilities, that the reassessments had been mailed out on April 29 or 30, 2002. According to the appellant, after acknowledging that the procedure in place would have resulted in the reassessments being made on time, the Tax Court Judge was bound to apply the rule stated in *Schafer*, and hold that the Minister had discharged the onus.

[19] Moreover, it was not open to the Tax Court Judge to hold that the test for establishing the date of mailing had not been met given that the incorrect postal code used by the Minister to mail the Notices on the second occasion had been supplied by the respondent.

Decision

[20] In my view, it is not necessary in this case to determine whether, despite acknowledging that the procedure in place would have resulted in the reassessments being mailed on time, the Tax Court Judge could hold that the Minister had not discharged his onus. The fact that the reassessments were sent to the wrong address leads to the conclusion that they were not issued at all.

[21] In this respect, I disagree with the appellant's contention that the error which led to the reassessments being sent to the wrong address is attributable to the respondent and that therefore, it cannot be "laid at the feet of the Minister" (*A.G. of Canada v. Bowen,* 91 D.T.C. 5594 (FCA) at 5596). As the prescribed tax return form requires, three addresses were given in the respondent's tax return; a mailing address, an address indicating where the Books and Records are kept, and the head office address. Both the head office and the mailing address were correctly inscribed. However, the reassessments were sent to the Books and Records address, which as noted, did not reflect the proper postal code.

[22] In the end, the reassessments were mailed to the wrong address on both occasions. As was stated in *L.B. Scott v. M.N.R.* [1960] C.T.C. 402 (Ex. Ct.) (*Scott*) at p. 417:

> "… it is in my opinion also to be inferred that Parliament never intended that such a notice could be given effectively by the "mailing" of it to the taxpayer at some wrong or fictitious address, and I find

> nothing in the statute to suggest that a taxpayer should be bound by an assessment or fixed with notice of assessment upon the posting of a notice thereof addressed to him elsewhere than at his actual address or at an address which he has in some manner authorized or adopted as his address for that purpose."

[23] The appellant argued that all three addresses indicated by the respondent in its tax return are "in some manner authorized or adopted" by it for mailing purposes. This of course ignores the prescribed form which specifically requires a taxpayer to provide an address for mailing purposes. In this case, this address happens to be different from the head office address and the Books and Records address. Obviously the mailing address is the only one authorized and adopted for mailing purposes.

[24] I agree with the respondent that absent an indication to the contrary, the mailing address is the one to which mail is to be sent including the reassessments here in issue. Had the reassessments been mailed to that address rather than the address indicated for Books and Records, they would have been made on time. The error is entirely attributable to the officers of the Minister who when the first Notices were returned failed to verify the respondent's mailing address by examining the tax returns.

[25] I would dismiss the appeal with costs.

"Marc Noël"
J.A.

"I agree.
John M. Evans, J.A."

"I agree.
B. Malone, J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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