Federal Court of Appeal  Cour d'appel fédérale

Date: 20190104

Docket: A-185-17

Citation: 2019 FCA 3

CORAM: **WEBB J.A.**
RENNIE J.A.
LASKIN J.A.

BETWEEN:

BRIGITTE GRATL

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on December 12, 2018.

Judgment delivered at Ottawa, Ontario on January 4, 2019.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: WEBB J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

[1] Brigitte Gratl appeals from the order of the Tax Court of Canada dated June 12, 2017, made by Justice Visser for oral reasons given on May 31, 2017. The Tax Court dismissed applications by Ms. Gratl under section 167 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), for orders extending the time for her to file notices of appeal from reassessments for her 2003 and 2004 taxation years. The basis for the applications was Ms. Gratl's assertions that she did not receive the notices of reassessment for 2003 and 2004 that are in issue, she did not file notices of

objection to these reassessments (as the Canada Revenue Agency states she did) and she did not receive the related notices of confirmation that the CRA states were sent to her.

[2] In determining the applications, the Tax Court followed the approach set out in *Mpamugo v. The Queen*, 2016 TCC 215, 2016 D.T.C. 1176, affirmed 2017 FCA 136, 2017 D.T.C. 5083. Based on its consideration of all of the evidence, the Tax Court found, on a balance of probabilities, that the Minister sent the notices of reassessment to Ms. Gratl on one of two dates in March 2009. It noted that the affidavits filed by officers of the Canada Revenue Agency provided specific evidence that the notices of reassessment were mailed. It acknowledged Ms. Gratl's contention that the Minister had a motive to fabricate the documents exhibited to these affidavits, but drew a negative inference from Ms. Gratl's failure to adduce evidence from her accountant to support her position, and ultimately found not to be credible her assertion that the notices were not sent. It also found that Ms. Gratl's accountant filed notices of objection and that the reassessments were subsequently confirmed.

[3] Ms. Gratl does not contest the legal framework that the Tax Court employed. She recognizes that to succeed in her appeal, she must establish that the Tax Court made a palpable and overriding error in coming to its core findings of fact. She submits that the Tax Court did so. In support of her submission, she points, as she did in the Tax Court, to what she argues are deficiencies in the affidavit evidence put forward by the Minister, and in particular to the Minister's failure to include as exhibits to the affidavits documents that would show clearly that the notices of assessment were sent and when.

[4] I agree with Ms. Gratl that the affidavit evidence submitted by the Minister could have been more definitive. For example, it would have been helpful to include copies or, if copies were no longer available, at least reconstructed versions of the notices of reassessment in issue. Similarly, since the deponent of one of the affidavits relied on a fax received from Ms. Gratl to conclude that she knew of the notices of reassessment and related notice of objection, and was receiving letters and messages from the CRA, it would have been helpful to include a copy of the fax as an exhibit. As a further example, one of the documents that was exhibited, and on which the Minister relied to establish mailing of the notices, was a form that was both undated and incompletely filled out.

[5] However, the palpable and overriding error standard is a high one. It prohibits an appellate court from setting aside a factual finding if there was "some evidence" on which the trial or motion judge could have relied to reach that finding: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 1, [2002] 2 S.C.R. 235. Here, despite the evidentiary issues referred to above, the affidavits filed by officers of the CRA provided evidence on which the Tax Court was fully entitled to rely. It follows that the Tax Court made no reviewable error in finding that the notices were sent.

[6] I would therefore dismiss the appeal with costs. The parties have agreed that, subject to the Court's discretion to determine otherwise, costs should be fixed at $1,000. I would order costs in that amount.

"J.B. Laskin"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-185-17
STYLE OF CAUSE:	BRIGITTE GRATL v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	DECEMBER 12, 2018
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	WEBB J.A. RENNIE J.A.
DATED:	JANUARY 4, 2019

APPEARANCES:

Brigitte Gratl	SELF REPRESENTED
Gregory B. King	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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