Federal Court of Appeal | Cour d'appel fédérale

Date: 20200206

Docket: A-232-19

Citation: 2020 FCA 39

CORAM: **RENNIE J.A.**
DE MONTIGNY J.A.
LOCKE J.A.

Docket: A-232-19

BETWEEN:

MIKE DILALLA

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on February 5, 2020.

Reasons delivered at Vancouver, British Columbia, on February 6, 2020.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

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RENNIE J.A.

[1] In reasons rendered from the bench on May 21, 2019, the Tax Court of Canada (*per* D'Arcy J., 2015-5070 (IT)G), dismissed the appellant's motion for leave to bring a motion for an order striking the respondent's reply pleading. The judge ruled that to hear the appellant's motion to strike would contravene Rule 8 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (*Tax Court General Procedure Rules*).

[2] Colloquially known as the “fresh step rule”, Rule 8 of the *Tax Court General Procedure Rules* provides:

> 8 A motion to attack a proceeding or a step, document or direction in a proceeding for irregularity shall not be made,
>
> (a) after the expiry of a reasonable time after the moving party knows or ought reasonably to have known of the irregularity, or
>
> (b) if the moving party has taken any further step in the proceeding after obtaining knowledge of the irregularity,
>
> except with leave of the Court.

[3] The Tax Court held that both parts (a) and (b) of Rule 8 were met and declined to grant leave for the appellant to file his motion. The judge gave four reasons for his decision: the lateness of the motion, its lack of merit, the absence of any prejudice to the appellant, and the prejudice to the respondent, the Minister. The judge also rejected the appellant’s argument that as the Reply was deficient, he was deprived of jurisdiction to consider Rule 8.

[4] The Tax Court found that the appellant brought the motion far too late in the litigation process. The motion objecting to the Minister’s Reply came almost three years after it was filed, and more than two years after all pre-trial proceedings had been completed. The motion was brought ten months after the parties had filed a joint application representing that the appeal was ready to be set down for hearing. The appellant had brought two interlocutory motions and one appeal to this Court. All had been dismissed, one with the observation by the Tax Court judge that it was a delaying tactic and abusive.

[5] The judge also observed that, as the appellant received the Reply pleading three years ago, he knew or ought reasonably to have known about and raised any irregularities in the Reply at that time. Indeed, the appellant's second motion demonstrated that he understood the distinction between pleadings of law and fact. The judge noted that to allow the motion would be prejudicial to the respondent as the appeal was scheduled for hearing at the time the motion was brought, and the respondent had conducted the discovery process believing there was no irregularity in the Reply.

[6] In declining to hear the motion, the Tax Court's reasons touched briefly on the merits of the appellant's motion. The judge concluded that the reply pleadings were not grossly deficient as asserted and that the facts assumed were not, as the appellant argued, conclusions of law. The judge observed that some of the evidence on which the Minister relied in the Reply had been corroborated by the appellant's own evidence. On the issue of prejudice, the judge noted that the Reply clearly set out the issues raised by the Minister, and the appellant would have an opportunity to challenge the Minister's assumptions at trial. The argument that the Reply contained statements of law could still be advanced by the appellant at trial.

[7] The Tax Court's decision whether to grant leave to bring a motion under Rule 8 is discretionary and has a large factual component. This Court will not overturn such a decision absent a palpable and overriding error or extricable error in the assessment of the evidence of law (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215; *Meerman v. Canada*, 2019 FCA 119 at para. 11).

[8] The appellant has not identified any such error in the Tax Court's decision. The facts amply justify the decision not to grant leave to the appellant to file his motion. The fresh step rule is designed to ensure the orderly movement of litigation through to trial. The rule is based on the view that if a party pleads over to a pleading, it implies a waiver of any irregularity that might have been attacked. Here, the judge's discretion was exercised consistent with the objective of this rule and filed evidence before him. It was also exercised in a manner consistent with existing jurisprudence which has applied the fresh step rule where a party seeks to strike a reply on the basis that the assumptions contained therein are conclusions of law instead of fact; *Gerbro Inc. v. The Queen*, 2014 TCC 179 at para 38; *Kulla et al v. Her Majesty the Queen*, 2005 TCC 136 at para 13.

[9] The thrust of the appellant's argument before this Court was that the Tax Court had no jurisdiction to decide the Rule 8 motion. As the Reply failed to assert a material fact, specifically that the appellant had a subjective intention to make a profit, the Tax Court allegedly had no jurisdiction to consider Rule 8.

[10] This argument is devoid of merit. Any deficiency in the reply pleading bears on the validity of the reassessment, and has no relevance to the jurisdiction of the Tax Court.

[11] The appellant also contends that the reasons for the decision are inadequate. Again, there is no merit in this argument. The reasons fully and fairly explain the basis on which the judge exercised his discretion.

[12] For the foregoing reasons, I would dismiss the appeal with costs.

"Donald J. Rennie"
J.A.

"I agree
Yves de Montigny J.A."

"I agree
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPEAL FROM AN ORDER OF THE TAX COURT OF CANADA DATED JUNE 10, 2019, NO. 2015-5070(IT)G

STYLE OF CAUSE:	MIKE DILALLA v. HER MAJESTY THE QUEEN
DOCKET:	A-232-19
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	FEBRUARY 5, 2020
REASONS FOR JUDGMENT OF THE COURT BY:	RENNIE J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LOCKE J.A.
DATED:	FEBRUARY 6, 2020

APPEARANCES:

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