Federal Court of Appeal | Cour d'appel fédérale

Date: 20201013

Dockets: A-399-19
A-400-19

Citation: 2020 FCA 169

CORAM: **WEBB J.A.**
WOODS J.A.
RIVOALEN J.A.

BETWEEN:

ANDREY RYBAKOV and
YULIA RYBAKOVA

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on September 16, 2020

Judgment delivered at Ottawa, Ontario, on October 13, 2020

REASONS FOR JUDGMENT BY: WOODS J.A.

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

Federal Court of Appeal  Cour d'appel fédérale

Date: 20201013

Dockets: A-399-19
A-400-19

Citation: 2020 FCA 169

CORAM: **WEBB J.A.**
WOODS J.A.
RIVOALEN J.A.

BETWEEN:

ANDREY RYBAKOV and
YULIA RYBAKOVA

Appellants

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

WOODS J.A.

[1] Before the Court are appeals from interlocutory orders of the Tax Court (*per* Monaghan J.) that denied the appellants' motions for default judgment brought pursuant to section 63 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a (GP Rules). The appeals concern the applicable timeline for the Crown to file replies in these matters.

[2] Section 63 of the GP Rules applies in circumstances where a reply to a notice of appeal has not been filed and served within the times specified in section 44 of these rules. In this event, section 63 permits a taxpayer to make an application to the Tax Court for judgment in respect of the relief sought in the notice of appeal. Upon such application, the Court may direct that the appeal proceed to hearing or it may allow the appeal. The provision is reproduced below.

63. (1) If a reply to a notice of appeal has not been filed and served within the applicable times specified under section 44, the appellant may apply on motion for judgment in respect of the relief sought in the notice of appeal.	**63. (1)** L'appelant peut, par voie de requête, demander qu'un jugement soit prononcé à l'égard des conclusions recherchées dans l'avis d'appel, si une réponse à l'avis d'appel n'a pas été déposée et signifiée dans les délais applicables prévus à l'article 44.
(2) On the return of the application for judgment, the Court may	**(2)** Lorsqu'elle est saisie d'une requête pour l'obtention d'un jugement, la Cour peut :
(*a*) direct that the appeal proceed to hearing; or	***a*)** ordonner l'audition de l'appel;
(*b*) allow the appeal if the facts alleged in the notice of appeal entitle the appellant to the relief sought; and	***b*)** accueillir l'appel si les faits allégués dans l'avis d'appel donnent à l'appelant le droit d'obtenir les conclusions recherchées;
(*c*) give such other direction as is just, including direction regarding the payment of costs.	***c*)** donner toute autre directive appropriée, y compris une directive portant sur le paiement des frais.
(3) The presumption in paragraph (2)(*b*) is a rebuttable presumption.	**(3)** La présomption visée à l'alinéa (2)*b*) est une présomption réfutable.

Background

[3] The facts have been set out in detail by the Tax Court. Accordingly, it is sufficient in these reasons to provide a brief summary.

[4] The appellants are Yulia Rybakova and her spouse, Andrey Rybakov. By notices of assessment dated April 18 and 21, 2017, the appellants were arbitrarily assessed by the Minister of National Revenue under Part IX of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA).

[5] On November 22, 2018, the appellants instituted appeals from the assessments in the Tax Court under the Court's informal procedure.

[6] By notices of reassessment dated March 11, 2019, the appellants were reassessed following an audit. Each reassessment was for the same reporting period as the corresponding arbitrary assessment, and substantially increased the amounts payable.

[7] Also on March 11, 2019, the appellants responded to the reassessments by filing amended notices of appeal that replaced the appeals of the arbitrary assessments with appeals of the reassessments. In addition, the pleading removed the reference to the informal procedure and stated that the appellants elected to proceed under the general procedure. The bump-up to the general procedure was effected by orders of the Tax Court dated April 17, 2019.

[8] On April 5, 2019, which is less than a month after the amended notices of appeal were filed, the appellants filed notices of motion which sought judgment in default pursuant to subsection 63(1) of the GP Rules on the ground that the outstanding replies had not been filed and served within the applicable timelines.

[9] The motions were heard together on April 29, 2019. No replies had been filed by this time.

[10] The motions were dismissed by orders of the Tax Court dated October 4, 2019, primarily on the ground that the replies were not late (2019 TCC 209). The appellants have appealed from these orders to this Court.

Discussion

[11] The main issue in these appeals is whether the Tax Court erred in its conclusion that the respondent had not failed to file replies within the required time. If this finding was not in error, the Court similarly did not err in refusing to grant default judgment pursuant to section 63 of the GP Rules because default judgment is only available if the replies are late.

[12] Central to the Tax Court's analysis was a finding that the applicable deadline for filing replies was 60 days from the date of service of the amended notices of appeal. This is the applicable deadline for filing replies to notices of appeal under subsection 44(1) of the GP Rules. Since the motions were filed and heard before the expiry of this 60-day period, the Tax Court concluded that the replies were not late.

[13] The appellants submit that the deadline was only 10 days from the service of the amended notices of appeal pursuant to the timelines for responding to amended pleadings under subsection 57(1) of the GP Rules. If the 10-day timeline is applicable, the replies in this case were late at the time that the notices of motion were filed.

[14] In considering this issue, it is necessary to have regard to the nature of the amended notices of appeal filed by the appellants. As mentioned above, the amended notices of appeal did not simply affect the arbitrary assessments. They also affected the reassessments.

[15] The amended notices of appeal were filed pursuant to paragraph 302(*b*) of the ETA. This provision permits a taxpayer to appeal from a reassessment or additional assessment directly to the Tax Court in specified circumstances without first filing a notice of objection. If paragraph 302(*b*) is applicable, the taxpayer is permitted to "amend [an existing] appeal by joining thereto an appeal in respect of the reassessment …". Section 302 provides:

302. Where a person files a notice of objection to an assessment and the Minister sends to the person a notice of a reassessment or an additional assessment, in respect of any matter dealt with in the notice of objection, the person may, within ninety days after the day the notice of reassessment or additional assessment was sent by the Minister,	**302.** La personne, ayant présenté un avis d'opposition à une cotisation, à qui le ministre a envoyé un avis de nouvelle cotisation ou de cotisation supplémentaire concernant l'objet de l'avis d'opposition peut, dans les 90 jours suivant cet envoi :
(*a*) appeal therefrom to the Tax Court; or	***a*)** interjeter appel devant la Cour canadienne de l'impôt;
(*b*) where an appeal has already been instituted in respect of the matter, amend the appeal by	***b*)** si un appel a déjà été interjeté, modifier cet appel en y joignant un appel concernant la nouvelle

joining thereto an appeal in respect of the reassessment or additional assessment in such manner and on such terms as the Tax Court directs.	cotisation ou la cotisation supplémentaire, en la forme et selon les modalités fixées par cette cour.

[16] The question is this: If an appeal is amended pursuant to paragraph 302(*b*) of the ETA, are the timelines for replies governed by the applicable rules for filing responses to amended pleadings (subsection 57(1) of the GP Rules) or by the rules for filing replies to notices of appeal (subsection 44(1) of the GP Rules)? This is a question of law for which the applicable standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[17] In thorough and cogent reasons, the Tax Court judge concluded that the appropriate timeline was the 60-day deadline in subsection 44(1) of the GP Rules because an amended appeal under paragraph 302(*b*) of the ETA results in the institution of a new appeal. I am in agreement with the Tax Court's conclusion on this issue for the reasons that it gave (at paragraphs 24 to 65).

[18] I would mention, however, that this endorsement does not extend to an *obiter* comment of the Tax Court (at paragraphs 38 and 52) to the effect that a taxpayer is not permitted to choose between the appeal procedures set out in paragraphs 302(*a*) and 302(*b*) of the ETA where an appeal has already been instituted in respect of a matter. This comment is not relevant to the issues before the Court and my reasons should not be understood as endorsing it.

[19] This disposes of the main issue in these appeals. The time for filing replies had not expired and the appellants were therefore not entitled to apply for default judgment pursuant to

section 63 of the GP Rules. It is not necessary that I consider the alternative arguments discussed by the Tax Court. I turn now to consider some other issues raised by the appellants.

[20] First, the appellants submit that the Tax Court erred in granting the respondent an extension of time to file replies. I disagree. The overarching legal principle to be applied in considering whether or not to grant an extension of time is whether the extension is in the interests of justice (*Grewal v. Minister of Employment and Immigration*, [1985] 2 F.C. 263, 63 N.R. 106 (C.A.), referred to in *Alberta v. Canada*, 2018 FCA 83, 425 D.L.R. (4th) 366 at para. 45 and *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184 at para. 62). This test is also referred to in section 63 of the GP Rules (at paragraph 63(2)(*c*)). In this case, the Tax Court judge provided ample justification for the extension of time that was granted.

[21] As for the appellants' submission that the respondent was required to file a formal notice of motion to extend the time to file replies pursuant to section 65 of the GP Rules, plainly the Tax Court can dispense with this requirement (section 9 of the GP Rules).

[22] Accordingly, regardless of the standard of review that is applied, no reviewable error was made regarding the extension of time to file replies.

[23] Second, the appellants submit in their memoranda of fact and law that the Tax Court erred with respect to costs by not giving the appellants the right to introduce evidence and information that would be relevant to a costs award.

[24] In the Tax Court's reasons, the judge explained that the costs requested by the appellants would not be awarded since the appellants were "wholly unsuccessful" in the motions. In this Court, the appellants submit that the Tax Court erred by not giving them an opportunity to address costs at the hearing because the circumstances justified an award of costs to the appellants in any event of the cause. To my knowledge, the appellants made no specific request in the Tax Court for costs in any event of the cause, nor did they request to make costs submissions. The appellants cannot complain of unfairness in these circumstances.

Conclusion

[25] I have concluded that the Tax Court did not err in refusing to grant default judgment because the replies were not late, in granting an extension of time to file replies, and in dealing with costs. Accordingly, I would dismiss the appeals. I would also award one set of costs to the respondent fixed in the amount of $5,000, all inclusive. This reflects that several of the issues raised were of dubious merit.

"Judith Woods"
J.A.

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

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-399-19 and A-400-19
STYLE OF CAUSE:	ANDREY RYBAKOV and YULIA RYBAKOVA v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 16, 2020
REASONS FOR JUDGMENT BY:	WOODS J.A.
CONCURRED IN BY:	WEBB J.A. RIVOALEN J.A.
DATED:	OCTOBER 13, 2020

APPEARANCES:

Bobby B. Solhi Bhuvana Rai	FOR THE APPELLANTS
Katie Beahen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP Toronto, Ontario	FOR THE APPELLANTS
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT