Federal Court of Appeal  Cour d'appel fédérale

Date: 20210304

Docket: A-410-19

Citation: 2021 FCA 43

CORAM: **PELLETIER J.A.**
WOODS J.A.
MACTAVISH J.A.

BETWEEN:

632738 ALBERTA LTD.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard by online video conference hosted by the registry on January 27, 2021.

Judgment delivered at Ottawa, Ontario, on March 4, 2021.

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: PELLETIER J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

WOODS J.A.

[1] The appellant, 632738 Alberta Ltd. (632), brought an application in the Tax Court to have an issue in its income tax appeal determined in advance of the trial. The Tax Court concluded that this was not appropriate and dismissed the application (2019 TCC 225). 632 has appealed to this Court.

[2] In the application, 632 sought a determination as to the scope of a waiver it filed with the Minister of National Revenue. It formulated the question as follows:

> Is the sole ground in support of the reassessment at issue in this appeal, raised in the Respondent's Amended Reply, beyond the scope of the waiver of the normal reassessment period executed by the Appellant in respect of its December 31, 2011 taxation year …?

[3] 632 brought the application pursuant to section 58 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-668a (the Rules). Section 58 provides a mechanism by which questions raised in the pleadings or questions as to the admissibility of evidence may be determined by the Tax Court in advance of the trial.

[4] The hearing before the Tax Court was pursuant to subsection 58(1) of the Rules, which is commonly referred to as a stage 1 hearing. The sole purpose of this hearing is to determine whether it is appropriate that the question be answered at a further hearing, stage 2, in advance of the trial. The Rules permit the Court to order that the matter proceed to stage 2 "if it appears that the determination of the question before the hearing may dispose of all or part of the proceeding or result in a substantially shorter hearing or a substantial saving of costs" (subsection 58(2) of the Rules). The Court also has the discretion to dismiss the application even if the mandatory conditions, above, are satisfied.

Background

[5] In a proposal letter dated April 14, 2015, 632 was informed by the Canada Revenue Agency that it proposed to issue a reassessment for 632's taxation year ended December 31, 2011. The proposed reassessment would increase 632's share of partnership income by approximately $78 million as a result of the application of subsection 103(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). Subsection 103(1) is an anti-avoidance provision that permits each partner's share of income from a partnership to be re-determined in specified circumstances.

[6] At the time the proposal letter was sent, the usual deadline for issuing reassessments was fast approaching. The proposal letter provided 632 with thirty days to make representations and confirmed that a valid waiver must be filed if additional time was required. A draft waiver was included with the proposal letter which specified that the waiver applied to: "Partnership income of $99,991 reported on Schedule 1."

[7] The effect of filing a waiver is that the usual deadline for issuing reassessments does not apply to the extent that a reassessment issued after the deadline "can reasonably be regarded as relating to … a matter specified in [the] waiver …" (subparagraph 152(4.01)(a)(ii) of the Act). The current version of subparagraph 152(4.01)(a)(ii) reads:

(4.01) Notwithstanding subsections (4) and (5), an assessment, reassessment or additional assessment to which paragraph (4)(a), (b), (b.1), (b.3), (b.4) or (c) applies in	**(4.01)** Malgré les paragraphes (4) et (5), la cotisation, la nouvelle cotisation ou la cotisation supplémentaire à laquelle s'appliquent les alinéas (4)a), b), b.1),

respect of a taxpayer for a taxation year may be made after the taxpayer's normal reassessment period in respect of the year to the extent that, but only to the extent that, it can reasonably be regarded as relating to,	b.3), b.4) ou c) relativement à un contribuable pour une année d'imposition ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans la mesure où il est raisonnable de considérer qu'elle se rapporte à l'un des éléments suivants :
(a) where paragraph 152(4)(a) applies to the assessment, reassessment or additional assessment,	**a)** en cas d'application de l'alinéa (4)a):
…	…
(ii) a matter specified in a waiver filed with the Minister in respect of the year;	**(ii)** une question précisée dans une renonciation présentée au ministre pour l'année;
…	…

[8] 632 duly filed a waiver in the form prescribed but it changed the "matter specified" from that suggested by the Canada Revenue Agency. The matter specified in the waiver that was filed with the Minister is:

> The application of subsection 103(1) to the taxpayer's income of $99,991 from the Thomson [*sic*] Contractors Partnership reported on Schedule 1.

[9] In any event, the Minister reassessed 632 after the usual deadline for issuing reassessments.

[10] In its application to the Tax Court, 632 sought a determination of a question regarding the scope of the waiver. The question is set out in paragraph 2 above. One premise underlying the

question is that in determining whether the reassessment is within the scope of the waiver for the purpose of subparagraph 152(4.01)(a)(ii), the reassessment should be considered from the perspective of the grounds in support of the reassessment as stated in the Crown's amended reply. This approach is not in dispute and follows this Court's decision in *Canada v. Honeywell Limited*, 2007 FCA 22, [2007] 3 C.T.C. 7.

[11] The amended reply states the issue to be determined as follows:

> … whether the Minister correctly determined the share of the Appellant's income from [Action LMS Limited Partnership], as per subsection 103(1) of the *Income Tax Act*.

[12] 632 filed an answer to the amended reply which took the position that the issue stated in the amended reply is outside the scope of the waiver. 632's position is that the waiver is limited to allocations of income from Thompson Contractors Partnership (Thompson GP) and does not include allocations of income from Action LMS Limited Partnership (Action LP).

[13] The factual background underlying the reassessment is set out in detail in the reasons of the Tax Court and will not be repeated here. It is sufficient to note that Thompson GP and Action LP are tiered partnerships. Action LP is the top-tier partnership and holds a partnership interest in Thompson GP. For a time, 632 held a partnership interest in each partnership.

[14] The reassessment concerns the application of subsection 103(1) of the Act to partnership income of approximately $78 million. This was initially earned by Thompson GP. Virtually all of this income was allocated from Thompson GP to Action LP. Virtually all of the income

allocated to Action LP was then allocated from Action LP to two of its partners. These partners were corporations that could offset the income allocated to them with pre-existing non-capital losses and expenses.

Issue and appellate standard of review

[15] The issue in this appeal is whether the Tax Court erred in concluding that the question specified in the application should not be determined in advance of the trial.

[16] As for the appellate standard of review, questions of law are to be determined on the correctness standard, and questions of fact and questions of mixed fact and law (excluding extricable questions of law) are to be determined on the basis of a palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331). In interpreting the palpable and overriding error standard, an "error is palpable when it is plainly seen, and overriding when it affects the result" (*Canadian Imperial Bank of Commerce v. Canada*, 2021 FCA 10 at para. 55).

[17] In the analysis below, all but one of the issues raise questions of mixed fact and law for which the palpable and overriding error standard of review applies. The correctness standard of review applies to the one extricable error of law identified below.

Analysis

[18] In dismissing the application, the Tax Court determined that:

(a) it does not appear that a stage 2 hearing would shorten the hearing of the appeal or reduce costs;

(b) the summary nature of the stage 2 hearing would unfairly permit 632 to control the manner in which the Crown may elicit and adduce evidence; and

(c) 632 would not be surprised with the basis of the reassessment; accordingly, it appears that 632 would have no reasonable chance of success in a stage 2 proceeding.

[19] It is not necessary in these reasons to consider all of these conclusions. I intend to focus on paragraph (b), above, which is dispositive of this appeal. These reasons should not be construed as endorsing the conclusions at paragraphs (a) and (c).

[20] As mentioned in paragraph (b), the Tax Court concluded that determining the scope of the waiver in the context of a stage 2 hearing would unfairly permit 632 to control the manner in which the Crown may elicit and adduce evidence. The Court made several findings in the course of reaching this conclusion. They are:

(i) in light of subsection 152(4.01) of the Act, the scope of the waiver includes transactions that are related or connected to the transaction specified in the waiver;

(ii) the record before the Court does not clearly demonstrate that the scope of the waiver is limited to allocations of income from Thompson GP;

(iii) a stage 2 hearing would unfairly preclude the Crown from conducting examinations for discovery of the individual who signed the waiver;

(iv) the onus is on the Crown to prove a reasonable connection between the reassessment and the matter specified in the waiver; and

(v) the Court tasked with determining the scope of the waiver will require a full understanding of the factual circumstances that led to the reassessment, and for this purpose it is necessary for the Court to have evidence substantially similar to the evidence relevant to the merits of the case.

[21] At the outset, I would observe that many of the Tax Court's findings, above, decide issues that ultimately will have to be decided by the judge tasked with determining the scope of the waiver. This should be avoided at a stage 1 proceeding if at all possible. In this case, the Tax Court could have accomplished its task at stage 1 by determining whether issues are arguable, rather than deciding them. The result is unfortunate.

[22] The Supreme Court of Canada has often cautioned about the difficulties that can arise if there are potential inconsistent results in different hearings. In the context of a stage 1 hearing under section 58 of the Rules, the potential for inconsistent findings often arises. This possibility needs to be carefully considered at stage 1 in order to avoid the "scandal of inconsistent findings between courts" (*R. v. Mahalingan*, 2008 SCC 63, [2008] 3 S.C.R. 316 at para. 106; see also *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at para. 60).

[23] I will now consider the factors that the Tax Court took into account in reaching the conclusion at paragraph (b) above.

[24] First, the Tax Court found that the waiver encompasses transactions that are related or connected to a transaction specified in the waiver. The Court relied on subsection 152(4.01) of the Act, and in particular the phrase: "can reasonably be regarded as relating to … a matter specified in a waiver."

[25] This finding does not give rise to a palpable and overriding error. In addition, as mentioned earlier, it is sufficient for the Court to make a finding that the issue is arguable. I find that it is.

[26] 632 submits that the Tax Court's finding gives rise to an error of law because it is inconsistent with the applicable test for determining the scope of a waiver set out in *Solberg v. The Queen*, [1992] 2 C.T.C. 208 (F.C.T.D.). Referring to paragraph 13 of *Solberg*, 632 submits that the test requires the Tax Court to determine "the intention of the parties to the Waiver as

expressed in the document itself and any extrinsic evidence" (appellant's memorandum at para. 33). 632 submits that in applying this test, the only conclusion that could be reached by the Tax Court is that the waiver was limited to the allocation of income from Thompson GP.

[27] I disagree with this submission. In its reasons, the Tax Court took into account the statutory language: "… reasonably be regarded as relating to … a matter specified in a waiver" (subparagraph 152(4.01)(a)(ii) of the Act). In *Solberg*, the Federal Court's reasons did not refer to this language, and the decision was not based on it. Accordingly, it was not an extricable error of law for the Tax Court to fail to apply *Solberg.*

[28] Second, the Tax Court rejected 632's submission that, based on the record before the Court, the parties clearly intended the waiver to be limited to an allocation of income from Thompson GP. There is no reversible error with the Tax Court's conclusion on this issue.

[29] There are several inconsistencies or ambiguities on the record that may be relevant to the parties' intention which 632 has failed to adequately explain. An illustration of this is the failure of 632 to adequately explain a correction to an undertaking provided by the Crown which suggests that the Crown may have had a different intention. In addition, it is clearly arguable that the waiver itself is inherently ambiguous because it refers to income from Thompson GP and it also refers to income of $99,991, which is in fact income from Action LP. Finally, the record suggests that the notice of objection and the notice of appeal describe the issue as concerning the allocation of income from Action LP. Again, this raises a question as to the intention of the parties at the time. Accordingly, the Tax Court did not err in rejecting 632's submission that it

was clear that the waiver was intended to be limited to allocations of income from Thompson GP.

[30] Third, the Tax Court found that a stage 2 hearing would unfairly preclude the Crown from conducting examinations for discovery of the individual who signed the waiver. There is no reversible error in this conclusion. 632 submits that examinations for discovery are not necessary to determine the scope of the waiver, and that it is sufficient to conduct a cross-examination on affidavits. I disagree. The two procedures are materially different. The Tax Court did not err in rejecting 632's submission.

[31] Fourth, the Tax Court determined that the Crown will have the onus of proving a reasonable connection between the reassessment and the matter specified in the waiver. The Crown argued that the onus of proof bolsters its argument that it needs to introduce substantial oral evidence. However, the Crown's ability to introduce evidence will not turn on who bears the onus. Accordingly, it is not necessary in this appeal to consider who bears the onus.

[32] Fifth, the Tax Court found that the determination of the scope of the waiver must be based on a full understanding of the factual circumstances that led to the reassessment. Accordingly, it is necessary for the Court to have evidence relevant to the application of subsection 103(1) of the Act. It is submitted that this evidence is substantially similar to the evidence that will be adduced at the full trial.

[33] Whether this evidence is necessary to determine the scope of the waiver should be determined by the Court tasked with making this determination. However, for the reasons above, it is arguable that the Crown should not be precluded from introducing this evidence.

[34] In light of these findings, the Tax Court did not err in determining that the summary nature of a stage 2 hearing would be unfair to the Crown because it would allow 632 to control how evidence is elicited and adduced.

[35] I would dismiss the appeal with costs.

"Judith Woods"
J.A.

“I agree.
J.D. Denis Pelletier J.A.”

“I agree.
Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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