Federal Court of Appeal | Cour d'appel fédérale

Date: 20230929

Docket: A-236-22
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A-238-22

Citation: 2023 FCA 201

CORAM: **DE MONTIGNY J.A.**
LEBLANC J.A.
GOYETTE J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

ADBOSS, LTD.,
LIBERTY STREET MANAGEMENT LTD.,
and BLUECOVE MANAGEMENT LTD.

Respondents

Heard at Toronto, Ontario, on September 27, 2023.

Judgment delivered at Ottawa, Ontario, on September 29, 2023.

REASONS FOR JUDGMENT BY: GOYETTE J.A.

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

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REASONS FOR JUDGMENT

GOYETTE J.A.

[1] His Majesty the King appeals three decisions of the Tax Court of Canada *per* Lafleur J. which struck certain corporate residency allegations from the Minister of National Revenue's (Minister) assumptions of fact pled in the replies to the notices of appeal: *Adboss, Ltd. v. The King*, 2022 TCC 125 [*Adboss*]; *Bluecove Management Ltd. v. The King*, 2022 TCC 126; and

Liberty Street Management Ltd. v. The King, 2022 TCC 127. These decisions will be collectively referred to as the *TCC Decisions*; however, the paragraphs cited will be to *Adboss*.

I. Background

[2] The Minister reassessed the net tax of Adboss, Ltd., Liberty Street Management Inc., and Bluecove Management Ltd. (respondents) under Part IX of the *Excise Tax Act*, R.S.C. (1985), c. E-15 (*ETA*). The reassessments are premised on the basis that the respondents should have collected GST/HST in respect of services supplied to Lowfroc Investments Ltd. and/or WebOps S.A.R.L. (Recipients). According to the Minister, the services were taxable supplies made in Canada to residents of Canada under the ETA. The respondents contend that the services were zero-rated supplies to non-residents of Canada.

[3] The respondents filed notices of appeal in the Tax Court following which the Minister filed replies. Each reply contains a paragraph that lists the assumptions made by the Minister in reassessing (Paragraph). The last assumption listed in the Paragraph (Impugned Assumption) reads:

> [A]t all material times, the controlling mind and management of [the Recipients] was in Canada.

[4] The respondents made two demands for particulars to the Minister concerning the Impugned Assumption. The appellant refused both these demands.

[5] The respondents then filed motions before the Tax Court to strike the Impugned Assumption.

[6] At the motion hearing, the appellant said that, if the Tax Court allowed the motion, he would not need leave to amend the Paragraph because it already included all the assumptions of fact about the Recipients' residency.

II. TCC Decisions

[7] The Tax Court began its analysis by highlighting that the legal test for determining the residency of a corporation requires the determination of where the "controlling mind and management" (also called "central management and control") of the corporation abides or is located. Various facts must be considered to make that determination: *TCC Decisions* at paras. 18 to 23.

[8] The Tax Court then referred to the jurisprudence of the Supreme Court of Canada, according to which a question of mixed fact and law is one that asks whether a given set of facts satisfy a legal test or one that requires applying a legal test to a set of facts: *TCC Decisions* at paras. 24-25 citing *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 SCC 385 [*Southam*] at para. 35 and *Housen v. Nikolaisen*, 2002 SCC 33 [*Housen*] at para. 26. The Tax Court noted that in *Housen,* the Supreme Court indicated in *obiter* that the identification of the directing minds of a corporation is a question of mixed fact and law. On that basis, the Tax Court concluded that the Impugned Assumption is a statement of mixed fact and law; therefore, it

could not be included in the assumptions of fact made by the Minister when making the assessments: *TCC Decisions* at paras. 18, 27-29.

[9] From there, the Tax Court turned to Rule 53 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688A (Rules). Rule 53 contains the test for striking out pleadings. It provides that a pleading may be struck if it "may prejudice or delay the fair hearing of the appeal" or "is an abuse of the process of the [Tax] Court": Rules 53(1)(*a*) and (*c*). The Tax Court found that the Paragraph should be struck on the basis of both Rules 53(1)(*a*) and (*c*): *TCC Decisions* at paras. 33 to 38. In the words of the Tax Court:

> Hence, because the Appellant will have to speculate as to the facts underlying the conclusion of mixed fact and law of the Minister that the "controlling mind and management" of Lowfroc was in Canada, and because the Appellant therefore cannot be properly prepared for and proceed with discoveries, this will prejudice or delay the fair prosecution of the appeal and constitutes an abuse of the Court's process.
>
> (*TCC Decisions* at para. 37)

III. Issues

[10] On appeal the appellant raises two issues:

a) Is the location of the controlling mind and management a question of fact such that the Impugned Assumption is not one of mixed fact and law?

b) In any event, should the Impugned Assumption be allowed to stand on the basis that the Tax Court erred in law in treating the Impugned Assumption as an assumption of mixed fact and law that ought to have been struck?

[11] As recently stated by this Court:

> A decision to strike out a pleading is a discretionary decision. Therefore, the appellate standard of review applies and this Court's intervention is justified only where the Tax Court made an error of law or a palpable and overriding error on a question of fact or mixed fact and law (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*,2016 FCA 215 at paras. 66, 79).
>
> (*Canada v. Preston*, 2023 FCA 178 [*Preston*] at para. 12.)

[12] With this standard of review in mind, the next paragraphs will examine whether this Court's intervention is justified. Furthermore, given that *Preston* provides a comprehensive and contemporary summary of the law on the issue of whether an assumption in reply to a notice of appeal should be struck out, the analysis below is grounded on the teachings of that decision.

IV. Analysis

A. *The Impugned Assumption is one of mixed fact and law*

[13] The appellant asserts that the Tax Court erred in law by concluding that the Impugned Assumption is one of mixed fact and law.

[14] To support his assertion, the appellant quotes several appellate authorities, which say that the controlling mind and management must be determined "on the facts" or as "factual findings", and that its location is "factual and concrete", a "question of fact", or "a matter of fact": *De Beers Consolidated Mines, Ltd. v. Howe*, [1907] UKHL 626 (BAILII), [1906] A.C. 455 at p. 458; *Fundy Settlement v. Canada*, 2012 SCC 14 at paras. 6, 9, 15; *Landbouwbedrijf Backx B.V. v. Canada*, 2019 FCA 310, at para. 8.

[15] However, read in context, these authorities say that determining the location of the controlling mind and management is a fact-driven analysis, in which courts must scrutinize the facts of the case. None of the authorities the appellant cites were analyzing whether controlling mind and management was a question of fact *as opposed to a question of mixed fact and law*. As mentioned, the Supreme Court did consider this issue, albeit in an *obiter*, and concluded that the controlling mind and management question is one of mixed fact and law: *Housen* at para. 34. This is not surprising: determining the location of the controlling mind and management requires applying a legal test to a set of facts: *Southam* at para. 35; *Housen* at para. 36. Therefore, I find that the Tax Court committed no error in concluding that the Impugned Assumption was one of mixed fact and law.

B. *Striking out the Impugned Assumption was not an overriding and palpable error*

[16] Rule 49(1)(*d*) requires the Minister's reply to state the assumptions of fact that she made "when making the assessment". This is important because the taxpayer usually bears the burden of disproving these assumptions: *Preston* at para. 3.

[17] Legal statements or conclusions of law have no place in the Minister's factual assumptions: *Canada v. Anchor Pointe Energy Ltd.*, 2003 FCA 294 at para. 25. Similarly, factual elements in a statement of mixed fact and law should be extricated, so that the taxpayer knows exactly what factual assumptions it must demolish in order to succeed: *Preston* at paras. 8, 25 and 31. That said, not every conclusion of mixed fact and law that appears as an assumption must necessarily be struck: *Preston* at para. 31.

[18] Indeed, deficient pleadings may be allowed to stand—for example, (1) when assumptions of mixed fact and law are tangential to the legal issues in dispute, (2) when assumptions will not cause prejudice to the taxpayer, (3) when the facts are simple, or (4) when letting the deficient pleadings stand better serves the trial process: *Eisbrenner v. Canada*, 2020 FCA 93 [*Eisbrenner*] at para. 42; *Preston* at paras. 32 and 36.

[19] To determine whether a pleading should be allowed to stand, the Tax Court must consider the factual circumstances, the jurisprudence, and Rule 53(1): *Preston* at para. 32. This is the methodology that the Tax Court followed in the case at bar (*TCC Decisions* at paras. 33–38). It led the Tax Court to conclude that the Impugned Assumption ought to be struck out because it will prejudice or delay the hearing within the meaning of Rule 53(1)(*a*), and constitute an abuse of the Tax Court's process pursuant to Rule 53(1)(*b*).

[20] The Tax Court found that the respondents would suffer a prejudice because they would be "left to speculate as to the facts underlying the conclusion of mixed fact and law of the Minister that the 'controlling mind and management' of [the Recipients] was in Canada": *TCC*

Decisions at para. 37. However, the appellant acknowledged that he would not need leave to amend the replies if the Impugned Assumption was struck because all his assumptions of fact regarding the Recipients' residency were already listed in the Paragraph. This acknowledgement entails that there were no facts left for speculation.

[21] Nevertheless, the Tax Court's finding of prejudice becomes evident in light of the Tax Court's conclusion that the Impugned Assumption was an abuse of process. The appellant refused to respond to the demands for particulars. He only informed the respondents that no additional facts underlined the Impugned Assumption at the hearing before the Tax Court. If the appellant had simply answered the demands for particulars, a motion to strike would have been unnecessary. In such a scenario, the deficient pleadings in the replies would have been fixed: *Preston* at para. 39.

[22] Not only did the appellant refuse to provide particulars, he refused to do so in respect of an element of his pleadings that went to the heart of the appeal—namely, whether the Recipients' controlling mind and management is in Canada. The answer to that question will dictate whether GST/HST should have been collected. The respondents had few options if they wanted to know what factual assumptions they must demolish in order to succeed in their appeal. Bringing the motion to strike was one of those options. It entailed unwarranted costs and time, and delayed the hearing of the appeal.

[23] Consequently, on the facts of this case, I do not see any palpable and overriding error in the Tax Court's conclusion that the Impugned Assumption caused prejudice to the respondents

and constituted an abuse of process. Indeed, the Tax Court is entitled to great deference in the exercise of its discretion on motions to strike. In oral arguments, the appellant asked us to consider awarding costs against him and leave the Impugned Assumption standing. Our Court's role is to look for a palpable and overriding error, not to reweigh the applicable factors and determine whether we would have come to a different conclusion if we had been in the motion judge's position.

[24] Before disposing of this appeal, I wish to address an argument counsel raised about the broader consequences of this decision. The appellant argues that if he cannot include the Impugned Assumption in his assumptions of fact, then courts will necessarily strike all assumptions of mixed fact and law. I disagree. The problems with the appellant's argument are twofold. First, *Eisbrenner* teaches us that statements of mixed fact and law will not be struck if they do not go to the heart of the matter—*i.e.* if they are merely tangential. Here, the issue of the Recipients' controlling mind and management is at the heart of the litigation. Second, statements of mixed fact and law may stand when the facts are simple and the taxpayer is not left to speculate about what the Minister was getting at in an assumption: *Preston* at para. 36. For example, the Minister alleging that a five-year-old was a minor is a statement of mixed fact and law inasmuch as it engages the legal test for majority. However, that statement need not be struck because the taxpayer can clearly discern the underlying fact the Minister was driving at. The situation in our case is quite different. The test for controlling mind and management is complex and shaped by decades of jurisprudence; a plethora of facts may inform the conclusion that the Recipients' controlling mind and management was in Canada. Thus, until the motion

hearing, the respondents were left to speculate about what underlying facts, if any, the Minister was referring to in the Impugned Assumption.

[25] Accordingly, I would dismiss the appeal with costs of $5,000.

"Nathalie Goyette"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-236-22 A-237-22 A-238-22
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CONCURRED IN BY:	DE MONTIGNY J.A. LEBLANC J.A.
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