Federal Court of Appeal | Cour d'appel fédérale

Date: 20241220

Docket: A-152-24

Citation: 2024 FCA 216

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

BETWEEN:

SODECIA CANADA INVESTMENTS INC.

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on December 16, 2024.
Judgment delivered at Ottawa, Ontario, on December 20, 2024.

REASONS FOR JUDGMENT BY: RENNIE J.A.
CONCURRED IN BY: WEBB J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] This is an appeal from a decision of the Tax Court of Canada (TCC), rendered March 27, 2024 (*Sodecia Canada Investments, Inc. v. The King*, 2022-3160(IT)G, per Smith J. [*TCC Decision*]). In that decision, the Tax Court judge granted the Minister's motion to quash the appeal of Sodecia Canada Investments, Inc. under paragraph 53(1)(d) of the *Tax Court of Canada Rules* (General Procedure). Sodecia had appealed from a 2017 notice of assessment, and

it was the Minister's position that no notice of objection was filed within the 90 day limit required by the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (ITA).

[2] A taxpayer's right to appeal to the TCC is predicated on the service of a valid notice of objection within the time limits outlined in section 169 of the ITA. Subparagraph 165(1)(a)(ii) of the ITA provides a taxpayer with 90 days from the date of a notice of assessment to object. The taxpayer may apply to the Minister to extend the time for service to one year after the expiry of the 90 days otherwise provided for in the ITA (paragraph 166.1(7)(a)).

[3] The appellant argued before the TCC that although the assessment bears the date of June 8, 2017, the Canada Revenue Agency (CRA) did not mail it until June 6, 2022, in which case its notice of objection, dated July 11, 2022, was timely.

[4] The Tax Court judge adopted the four-part test established in *Mpamugo v. The Queen* (2016 TCC 215, aff'd 2017 FCA 136 [*Mpamugo*]) to guide his analysis of the question of whether the Minister mailed the notice of assessment on the date indicated on the notice of assessment. The second step of *Mpamugo*, with which we are concerned, requires the Minister to prove on a balance of probabilities that the notice of assessment was mailed.

[5] After a review of the evidence, Smith J. was satisfied that the Minister established that the notice of assessment was mailed on June 8, 2017 (*TCC Decision*, at paras. 65-72, 82). It is this date that the assessment is deemed to have been made, and that the notice of assessment is deemed to have been received (subsection 244(15) and paragraph 248(7)(a) of the ITA).

[6] The Minister filed three affidavits in support of the motion. Subsection 244(10) of the ITA provides that, subject to certain preconditions, an affidavit from a CRA officer deposing that a notice of assessment was mailed on a certain day is, in the absence of proof to the contrary, evidence of the statements contained in it. The affiants were cross-examined on their affidavits, and testified before the judge, where they were again cross-examined.

[7] The Tax Court judge found the Crown witnesses' testimony "credible and convincing and unshaken by cross-examination" (*TCC Decision*, at para. 71). In particular, Smith J. accepted as probative CRA records confirming the notice of assessment was mailed on June 8, 2017, to the correct address, and the evidence of CRA witnesses explaining the systems and procedures in place for the preparation and mailing of notices of assessment for non-resident source deductions. The judge concluded that, on a balance of probabilities, the notice of assessment had been mailed on the date indicated (*TCC Decision*, at paras. 65, 69-70).

[8] The only issue before us is whether the Tax Court judge made a palpable and overriding error in his assessment of the evidence.

[9] The appellant contends that there was no evidence establishing that the notice of assessment, prepared on June 6, 2017, was included in the data file sent from Ottawa, where the notice of assessment was prepared, to Summerside, Prince Edward Island, where the notice of assessment would have been printed and mailed on June 8, 2017. The appellant argues that there is nothing on the face of the records that expressly referenced the appellant's notice of assessment. In addition to this missing link in the documentary chain of evidence, the appellant

contends that the judge erred in relying on the evidence of Mr. Hutter. Mr. Hutter had responsibility for the daily summary reports for notices of assessment prepared in respect of non-resident source deductions and the procedure by which they would be transmitted from Ottawa to Summerside for printing and mailing. He testified that the appellant's notice of assessment was sent to Summerside, but qualified some of his evidence as being "to the best of [his] knowledge".

[10] In support of this assertion, the appellant relies on Bowman J.'s rejection of the Crown's affidavit evidence in *Graham (H.B.) v. M.N.R. (informal)* ([1991] 2 CTC 2712, 26 DTC 1012 [*Graham*]), on the basis that it "contain[ed] the inadmissible statement that the Minister... 'to the best of my knowledge and belief sent a notice of confirmation to the appellant by registered mail'". However, the facts of *Graham* are far removed from the evidence that was before Smith J. In *Graham*, the Minister attempted to introduce the Crown's only evidence in an affidavit containing key evidentiary gaps and no exhibits in support. Central to Bowman J.'s rejection of the affidavit was that it spoke to a "notice of confirmation", which was a document unknown under the ITA then. *Graham* does not stand for the proposition that affidavits with respect to mailing of notices of assessment must be based on personal knowledge.

[11] There is no requirement under subsection 244(10) for personal knowledge with respect to the preparation and mailing of a particular notice of assessment. The subsection only requires that a CRA officer attest that they have charge of the appropriate records, knowledge of CRA's practices and procedures and that a search of the records shows that a notice of assessment was mailed. Subsection 244(10) is a reflection of the simple reality that personal knowledge of particular mailings is impossible given CRA mails over 55 million items each year and that the

question whether a notice of assessment was sent arises well after the fact of mailing. Subsection 244(10) also aligns with the business records provisions of the *Canada Evidence Act,* R.S.C., 1985, c. C-5, section 30.

[12] In sum, it is sufficient that the officer, or officers, collectively, have knowledge of CRA practices and procedures in respect of the preparation, transmission between offices and ultimate mailing of the notices of assessment. As the exercise is, in effect, looking through the rear-view mirror, there is no requirement for personal knowledge as to what transpired in the past. Witnesses will, however, have personal knowledge of the forensic exercise they undertook to establish whether the appropriate records show that the notice of assessment was mailed.

[13] I see no reviewable error in the Tax Court judge's assessment of the evidence.

[14] 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 (*Gratl v. Canada,* 2019 FCA 3, at para. 5 citing *Housen v. Nikolaisen,* 2002 SCC 33, at para. 1). Here, there was evidence before the judge on the question of continuity of the appellant's notice of assessment from preparation to transmission to printing and mailing.

[15] Mr. Hutter testified that he was able to confirm that, based on Sodecia's assessment date of June 8, 2017, the appellant's notice of assessment was prepared on June 6, 2017, and included in the batch data transmission sent to Summerside.

[16] As to how it could be known that the appellant's notice of assessment was included in the transmission to Summerside, Mr. Hutter testified that each notice of assessment has a unique "notice number" which allows individual assessments to be tracked and, in situations where a taxpayer has multiple notices of assessment, distinguished from one another. This notice number, along with the appellant's account number, were associated with the cycle which ran on June 6, 2017, and were included in a printout of a query that Mr. Hutter personally ran. Mr. Hutter's affidavit explained that "[i]nformation for the Appellant's Notice of Assessment for the 2013 taxation year was released from the EAO NRSD Summary report Cycle 1927, which ran on June 6, 2017, with a notice date of June 8, 2017". He then testified that he confirmed, by examining the Summerside "Daily Report", that "[i]nformation for the Appellant's Notice of Assessment for the 2013 taxation year was printed as part of a file provided to Summerside by Cycle 1927".

[17] As paragraph 69 of the TCC Decision demonstrates, Smith J. clearly understood and was satisfied by the evidence on this very point:

> Mr. Hutter provided a detailed explanation of the preparation of non-resident notices of assessment, the process for downloading that information to an excel file to be sent to a mailing centre with the cycle run date and cycle number that corresponded to the issue date of the Assessment. He was also able to cross-check that information with the records from the mailing centre.

[18] I agree with the appellant that the evidence establishing continuity of the notice of assessment's path from preparation through transmission could have been brought into sharper relief during the examination-in-chief and that the connection between the appellant's notice of assessment and cycle 1927 would have benefitted from more explicit elucidation. Nevertheless,

for the reasons indicated, the Tax Court judge made no reviewable error in finding that the notice of assessment was sent on the date indicated.

[19] Trial and motion judges are charged with making factual determinations, including whether the evidence is sufficient to establish a fact on a balance of probabilities. The appellant essentially asks this Court to reweigh the evidence and to disagree with the Tax Court judge's findings of fact. Absent a palpable and overriding error, this Court will not interfere in these matters.

[20] I would dismiss the appeal with costs which I would fix at $1,500.

"Donald J. Rennie"
J.A.

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

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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