Docket: 2002-557(IT)G

BETWEEN:

ELENI SKALBANIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Determination of a Question of Law Pursuant to Paragraph 58(1)(*a*)
of the *Tax Court of Canada Rules* (*General Procedure*) heard on
October 26, 2009 with Reasons delivered from the Bench
on October 30, 2009, both at Vancouver, British Columbia.

Before: The Honourable Justice J.E. Hershfield

Appearances:

Counsel for the Appellant:	David A.G. Birnie
Counsel for the Respondent:	Robert Carvalho

ORDER AND DETERMINATION OF LAW

Having heard the parties and considered the authorities provided, the Determination of law requested is as follows:

1. For the reasons attached it is determined that the reassessment that is the subject of this appeal was made on May 28, 2001 and was thereby made within the normal assessing period.

ACCORDINGLY, IT IS ORDERED THAT:

2. The Appellant is required to prosecute the appeal in the normal course and in accordance with the *Tax Court of Canada Rules (General Procedure)* of the Court.

3. The parties shall, within 60 days from the date of my signing this Determination and Order, report in writing to the Court as to the status of the appeal including the provision of any agreed deadlines for the completion of pre-hearing discoveries and undertakings.

4. Costs shall be in the cause.

Signed at Ottawa, Canada this 5th day of November 2009.

"J.E. Hershfield"

Hershfield J.

Citation: 2009 TCC 576
Date: 20091105
Docket: 2002-557(IT)G

BETWEEN:

ELENI SKALBANIA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR DETERMINATION OF LAW

Hershfield J.

The Issue

[1] The Appellant seeks a determination of a question of law pursuant to paragraph 58(1)(*a*) of the *Tax Court of Canada Rules* (*General Procedure*).

[2] The determination sought is that the reassessment being appealed was not made within the normal assessment period because it was not sent by the Minister of National Revenue (the "Minister") within the time required for doing so. If the determination sought is made, the appeal would be allowed and judgment could be given accordingly. If the determination sought is not made, the appeal would proceed in the normal course.

[3] A Statement of Agreed Facts was filed which satisfies a requirement for the subject *Rule* to apply, namely that no facts be in dispute.[1] Indeed both parties acknowledged that all the requirements for the determination sought to be heard were met. I am satisfied that this is the case as well.

[4] The question of law to be determined ultimately rests on a finding of whether the subject Notice of Reassessment was sent by the Minister on the day asserted by the Respondent. That day, May 28, 2001, was the last day of the normal reassessment

[1] *McLarty v. Canada (Minister of Citizenship and Immigration*), 2002 FCA 206.

period as prescribed by paragraph 152(3.1)(*b*) of the *Income Tax Act* (the "*Act*"). It was the last day of the three year period following the day of mailing of the original Notice of Assessment which was May 28, 1998.

[5] The authority for the Minister to reassess within the normal assessing period is found in subsection 152(4) of the *Act*. That subsection permits the Minister to "make" the reassessment within the time just referred to. The question as to whether the Minister "made" the subject reassessment on May 28, 2001 will, as noted, ultimately rest on a finding of whether the subject Notice of Reassessment was "sent" on that day as asserted by the Respondent.

Facts

[6] The agreed facts are as follows:

- The Minister prepared the subject Notice of Reassessment (the "Notice") which was dated May 28, 2001.

- On the same day the Notice was placed in an envelope addressed to the Appellant at her proper mailing address in Vancouver.

- The envelope containing the Notice was registered on the same day with Canada Post at Winnipeg for delivery to the Appellant at her mailing address.

- An officer of the Canada Customs Revenue Agency identified, as an exhibit to an affidavit, the post office certificate of registration of the envelope which registration date was May 28, 2001.

- The envelope bore the return address of the Minister at Winnipeg.

- The envelope was never delivered to the Appellant and Canada Post never obtained the signature of the Appellant or that of her representative in respect of the envelope, its contents or its delivery.

- By June 21, 2001 Canada Post returned the envelope and its contents to the Minister at Winnipeg as indicated by the word "Cancelled" stamped on the certificate of registration referred to above. The return of the envelope was pursuant to the Undeliverable Mail and Redirected Mail Regulations.

- On September 6, 2001 the Minister mailed the Notice to the Appellant's business. It was received by the Appellant's assistant and delivered to the Appellant's solicitor.

The Law

[7] The parties accept that the settled law dealing with the reassessment process is that a reassessment is not "made" until the Minister has completed the reassessment process by sending a notice of reassessment to the taxpayer. This statement of the law is found in *Jozo (Joe) Kovacevic v. The Queen*, 2002 DTC 1986 at paragraph 5. It is a statement of the law that is supported as well by the legislation. Subsection 244(15) of the *Act* provides that "Where any notice of assessment or determination has been *sent* by the Minister as required by the *Act*, the assessment or determination is deemed to have been *made* on the day of mailing of the notice of the assessment or determination." (Emphasis added.) Section 248 of the *Act* defines assessment to include a reassessment which is to say that the reassessment process includes as its final step the sending of the reassessment. That is when the reassessment is "made" for the purposes of determining whether a reassessment was made within the normal reassessment period.

[8] About this there is no dispute. The question posed of when the reassessment was "made" in this case will thus turn on whether the Notice was "sent" on May 28, 2001 being the last day of the normal reassessment period.

[9] In a nutshell, the argument of the Appellant is that registered mail is a process distinct from other methods of sending mail and is not complete where it is returned to the sender pursuant to the Canada Post Regulations.

[10] The Respondent relies on the presumption of proof of "sending by mail" that is set out in respect of registered mail in subsection 244(5) of the *Act* and on a body of jurisprudence supporting the view that the delivery of a notice to a third party such as Canada Post completes the act of "sending" for the purposes of determining whether or not a reassessment was made within the normal assessment period.

[11] I agree with the Respondent's position. However, before concluding with my reasons for coming to this conclusion it is necessary to examine more closely the Appellant's arguments as they have been carefully crafted and merit consideration. Further, they are not entirely without support as suggested in at least one authority that is relied on by the Appellant, namely, *Grunwald v. Canada*, 2005 FCA 421.

Appellant's Arguments

[12] The Appellant argues that a recurrent theme in much of the jurisprudence dealing with the Minister's obligation to complete the reassessment process is that it requires as the final step sending *effective* communication of the reassessment.

[13] The first case relied on is *Scott v. Canada (Minister of National Revenue - M.N.R.)*, 60 DTC 1273. In that case Thurlow J. observed at page 11 that Parliament could not be presumed to have intended that a required notice could be given by mailing if it could not thereby be given effectively such as where the mailing was to a wrong or fictitious address. Such an ineffective mailing could not be regarded as sent.

[14] Referring to *Herbert Flanagan v. The Queen and The Minister of National Revenue*, 87 DTC 5390, it was argued that the Federal Court of Appeal had to have had effective delivery in mind when it found that a failed attempt at personal delivery of a notice by an employee of the Minister meant that the notice was not sent or dispatched as required. Sending and retention were not compatible.

[15] In *Grunwald*, Justice Rothstein speaking for the Federal Court of Appeal calculated the expiry date of a limitation period by starting it on an effective personal service date as opposed to an earlier registered mail date where the registered mail was unclaimed. The inference was that unclaimed, undelivered or cancelled registered mail did not constitute a "sending" of the notice.

[16] Appellant's counsel also referred me to portions of Justice Rothstein's judgment that pointed out, for example at paragraph 47, that the *Act* was inconsistent as to the procedures whereby the Minister was required to communicate to a taxpayer. Such a fundamental obligation should be clear and needed to be addressed by Parliament. Appellant's counsel's suggestion was that the inconsistencies should lead me to make a finding that favoured a construction that gave the benefit to the taxpayer.

[17] Arguing on the other hand, that should I find that the language of the *Act* was clear, Appellant's counsel referred me to yet another portion of Justice Rothstein's judgment in *Grunwald* at paragraph 16 that underlined that even clear language should not be given effect where to do so gives rise to an absurd result. Seeing the purpose of the notice provisions as requiring effective communication by the Minister to taxpayers, the argument appears to be that I should seize on the opportunity, in respect of registered mail, to recognize that a cancelled registration, being ineffective communication, should not be regarded as having been sent. This

would avoid the application of a draconian construction that imposes a timely response obligation on a taxpayer whether or not he even knows about the reassessment.

[18] Appellant's counsel also referred me to provisions of the *Canada Post Corporation Act* which refers to the Special Services and Fees Regulations governing the delivery of registered mail. Subsection 6(1) of those regulations provides for registration of a letter on payment of the applicable fee and subsection 6(8) provides that the signature of the addressee or his representative must be obtained before registered mail is delivered. This suggests that the passing on of the Notice to Canada Post, returnable to the Minister, was not a completed surrender of the Notice. That being the case, the Notice could not be regarded as dispatched in any real or final sense.

[19] While I do not find it necessary to recite Respondent's counsel's arguments since my own analysis will cover many of the same points, I will refer to three such arguments that were dealt within Appellant's counsel's rebuttal.

[20] Firstly, as noted earlier in these Reasons, Respondent relies on the presumption in subsection 244(5) of the *Act* that the certificate of registration of a registered letter shall be received as evidence of the "sending". The rebuttal was to note that the subsection actually provides that the certificate of registration of a registered letter shall "in the absence of proof to the contrary" be received as evidence of the "sending". The rebuttal argument was that the agreed facts are proof to the contrary.

[21] Secondly, the Respondent relied on subsection 244(15) of the *Act* which, as noted above, provides that where a notice of an assessment or reassessment *has been sent* by the Minister as required by the *Act*, the assessment or reassessment is deemed to have been made on the day of mailing of the notice.[2] The Appellant notes that her position is based on the argument that the subject Notice was not sent. That is the determination requested; namely, whether the subject Notice was sent on the day it was registered at the post office and left there for delivery. I agree, whether subsection 244(15) applies begs the question before me.

[22] Thirdly, the Respondent relied on *VIH Logging Ltd. v. Canada*, 2004 DTC 2090; 2003 TCC 732 as authority for the proposition that "sent" means "dispatch" as suggested by the Federal Court of Appeal in *Flanagan*. In *VIH Logging Ltd.*, Justice

[2] See paragraph 7 of these Reasons.

Woods found that delivery by the Minister to a courier was sufficient dispatch of the Notice in that it was a giving up of possession of the notice. That the Minister had some power to recall the notice was not relevant. Giving up possession to a third party was sufficient. Justice Woods observed that the notion that giving up possession needed to be coupled with giving up control to recall, was not suggested by the authorities. The Appellant noted in rebuttal that these observations were *obiter dicta* and not persuasive.

Analysis

[23] The starting point in the analysis is to revisit the purpose of requiring the Minister to send notices of the type that is the subject of this determination.

[24] That purpose was well described in *Kovacevic*. At paragraph 5 Justice Bonner stated as follows:

> It is long settled law that an assessment is not made until the Minister of National Revenue (the "Minister") has completed the assessing process by sending notice of the assessment to the taxpayer. …

[25] Inherent in this statement is, in my view, the notion that the "sending" of notices by the Minister has precious little to do with communicating anything to the taxpayer. It is about identifying when the Minister completed the reassessment process. It is the completion date that measures whether the Minister has taken too long to reassess a taxpayer. The Minister cannot examine, enquire, propose and mull over its reassessing position forever. That process must end by a certain outside date and the manner of satisfying this requirement is to put it in writing and release it, by that date, from the confines and tinkering of the Agency. The correctness of this construction of the requirement of "sending" notices is abundantly clear to me.

[26] Nothing in the Appellant's arguments, as carefully crafted as they were, suggests that a different conclusion is warranted on the facts of this case involving a notice sent by registered mail. Indeed, to suggest otherwise would mean that a taxpayer could foil the Minister's ability to reassess within the normal reassessment period by avoiding receipt of registered mail.

[27] The Appellant's position might be best dealt with by referring separately to each aspect of the argument made.

[28] The Appellant cannot rely on the decision in *Scott* as authority for the proposition that a notice needs to be communicated to a taxpayer to be an effective sending. More recent cases have made that abundantly clear. For example, in *Schafer v. Canada*, 2000 DTC 6542, the Federal Court of Appeal confirmed that proof of failure of the postal system resulting in non-receipt does not change the start date of a prescribed limitation period.

[29] The Appellant cannot rely on the decision in *Flanagan* as authority for the proposition that a notice needs to be communicated to a taxpayer to be an effective sending. The failure in that case to "send" a notice resulted from the fact that the Minister never caused the notice to leave the possession of the Canada Revenue Agency ("CRA") personnel. It was not a question of whether the taxpayer received the notice. It was a finding that a notice that stays in the possession of the CRA cannot be regarded as having been sent. The case re-enforces the view that the Minister will only be regarded as having completed the reassessment process if the notice is turned over to a third party as part of a genuine delivery process. It matters not that the process may fail for any reason. That the Minister may regain possession of the notice, either by operation of law (such as mail returned by Canada Post, registered or not) or by contract such as with a third party courier, is of no import. The process is presumed to be transparent. Regaining possession cannot vitiate the initial sending.

[30] This point is brought home most clearly in *VIH Logging Ltd.*. While Justice Woods' comments, as noted above, may well be *obiter dicta*, they are compelling. She found that even though the Minister had some power to recall a courier so as to frustrate delivery of a notice, the notice must still be regarded as having been sent. While there may well be limits on this approach, absent evidence of bad faith or other similar reason for finding that the Minister retained effective possession and control of the notice, it is an approach that, in my view, reflects the law as intended to be applied by Parliament.

[31] In *Grunwald*, Justice Rothstein made it absolutely clear at paragraph 13 that he should not taken as making any finding on the effectiveness of sending a notice (by registered mail in that case) which was subsequently returned as unclaimed. He chose to avoid that question by looking only to a subsequent sending of the notice. In that case, looking at the later date extended the time available to file an objection. However, even that generous approach failed to result in a favourable outcome for the Appellant. This obviated the need to consider the issue of the earlier sending of the notice by registered mail – the taxpayer was out of time even disregarding the earlier sending, so it was disregarded. The inference that Appellant's counsel wants me to draw from the case cannot be made.

[32] As well, I cannot embrace the Appellant's counsel's suggestion that inconsistencies in the language in the *Act* regarding giving notice, as pointed out in *Grunwald*, should lead me to a less draconian construction of the subject provisions so as to avoid the absurdity of requiring a taxpayer to act on a wholly ineffective communication of a CRA reassessment.

[33] Keeping in mind that the purpose of the sending requirement has not been found to be communication to the taxpayer, one must ask how else is the noted absurdity avoided. The answer to that is, arguably at least, found in the time limits imposed on a taxpayer to respond to the notice. That time limit (90 days from mailing an assessment, reassessment or confirmation) can be extended by a full year on application to the Minister and then to this Court if the Minister does not grant the extension. See sections 166.1, 166.2 and 167 of the *Act*. The basis for allowing extensions includes consideration of just and equitable grounds. Arguably, such extensions would resolve most cases of initial non-communication. Indeed, it would presumably resolve all cases of initial non-communication where the CRA has knowledge of a delivery failure and has, such as in the present case, diligently pursued, as a follow-up, a more effective method of communication. Indeed, that follow-up, in the case at bar, assured the Appellant her day in Court.

[34] While this model adopted by Parliament to address ineffective communications may still seem draconian and potentially harsh and unjust, it is the model adopted by Parliament to contain the duration of disputes over revenue collections.

[35] At this point, I note as well, that there should be no question that even though the method of sending notices is not prescribed under the *Act*, registered mail is an acceptable method of "sending" by mail. Indeed, one can imagine that it might be seen as preferable from an evidentiary point of view and as being more reliable from a delivery point of view. Regardless, subsection 244(5) clearly provides that registered mail will satisfy the sending requirement.

[36] It is true, however, that the certificate of registration referred to in that subsection will only be evidence of sending in the absence of proof to the contrary. While that qualification might well be taken to mean that evidence of failure to deliver the registered letter dictates a finding that there has been no sending, I do not take that to be the case. What is rebuttable here is not the delivery to the taxpayer, but rather is the delivery and registration of the notice to Canada Post. Evidence that the

envelope was empty or contained something other than the notice would, for example, defeat the evidence of sending the notice.

[37] Lastly, I note that the provisions of the *Canada Post Corporation Act* and the Special Services and Fees Regulations governing the handling of registered mail do not impress me as having any impact on the question before me. The terms of reference of a third party holder of a notice who is given possession of it by the Minister for the genuine purpose of delivery are irrelevant to the question as to when the notice has been dispatched. The dispatch alone or surrender of the notice is the act that renders the reassessment as having been made.

[38] On that basis, and for all the reasons noted above, I conclude that the subject reassessment was made on May 28, 2001 and was thereby made within the normal assessing period.

[39] No submissions were made in respect of costs.

[40] Accordingly, the appeal of the reassessment shall be prosecuted in the normal course and costs shall be in the cause.

Signed at Ottawa, Canada this 5th day of November 2009.

"J.E. Hershfield"

Hershfield J.

CITATION:	2009 TCC 576
COURT FILE NO.:	2002-557(IT)G
STYLE OF CAUSE:	ELENI SKALBANIA AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	October 26 and October 30, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice J.E. Hershfield
DATE OF JUDGMENT:	November 5th, 2009

APPEARANCES:

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