

Docket: 2019-949(GST)I

BETWEEN:

LUXURY HOME LANDSCAPE  
CONSTRUCTION INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

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Motion heard on November 2, 2020 at Toronto, Ontario

Before: The Honourable Justice B. Russell

Appearances:

Agents for the Appellant: Frank Failie and Raad Murad  
Counsel for the Respondent: Sarah Mackenzie

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**JUDGMENT**

The Respondent's motion to quash the Appellant's Notice of Appeal is dismissed, with costs to the Appellant fixed at \$750, to be tendered within 30 days of the issuance date of this Judgment. The appeal itself, of which the undersigned is not seized, may be set down for hearing.

Signed at Halifax, Nova Scotia this 9th day of February 2021.

"B. Russell"

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Russell J.

Citation: 2021 TCC 4  
Date: 20210209  
Docket: 2019-949(GST)I

BETWEEN:

LUXURY HOME LANDSCAPE  
CONSTRUCTION INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

### **REASONS FOR JUDGMENT**

Russell J.

[1] The Respondent (Crown) has moved to quash the Notice of Appeal that the Appellant filed in this Court March 15, 2019, thereby instituting this appeal of an assessment raised under the federal *Excise Tax Act* (Act). (Statutory references as follow are provisions of the Act.)

[2] The Respondent asserts in its Notice of Motion that the Appellant did not file that Notice of Appeal within the 90 day period the Act provides for so doing, nor pursuant to any order permitting an extension of time for filing.

[3] The said Notice of Appeal shows that the appealed assessment was raised November 2, 2016 under the Act respecting its quarterly reporting period of April 1, 2016 – June 30, 2016. Should this application to quash the Notice of Appeal succeed, this appeal would be nullified *ab initio*.

[4] The 90 day period that the Respondent asserts the Appellant missed is provided for in section 306, as follows:

306. Appeal – A person who has filed a notice of objection to an assessment under this Subdivision may appeal to the Tax Court to have the assessment vacated or a reassessment made after either

(a) the Minister has confirmed the assessment or has reassessed, or

(b) one hundred and eighty days have elapsed after the filing of the notice of objection and the Minister has not notified the person that the Minister has vacated or confirmed the assessment or has reassessed,

but no appeal under this section may be instituted after the expiration of ninety days after the day notice is sent to the person under section 301 that the Minister has confirmed the assessment . . .

[Underlining added for emphasis.]

[5] Thus, the 90 day period commences immediately following a notice of confirmation having been “sent to the [objecting] person under section 301”. As for section 301, subsections (3) and (5) provide in relevant part:

301(3) Consideration of objection – On receipt of a notice of objection, the Minister shall, with all due dispatch, reconsider the assessment and vacate or confirm the assessment or make a reassessment.

301(5) Notice of decision – After reconsidering an assessment under subsection (3) . . . the Minister shall send to the person objecting notice of the Minister’s decision by registered or certified mail.

[Underlining added for emphasis.]

[6] Notably, subsection 301(5) specifies that a notice of confirmation is to be sent to the objecting taxpayer “by registered or certified mail”.

[7] Thus for purposes of this motion the issue is whether the Respondent has proven its assertion that a notice of confirmation of the appealed assessment was, per subsection 301(5), sent to the Appellant *qua* objector by registered mail on May 23, 2017, thereby commencing the referenced 90 day period. A 90 day period commencing on that date would expire August 21, 2017. As noted the Notice of Appeal was only filed March 15, 2019.

[8] Upon review of seemingly pertinent statutory provisions, subsection 335(1) appears to be quite relevant as to proving when a notice of confirmation under the Act has been sent by mail. That provision sets out what constitutes evidence, *i.e.*, proof, that a notice (which would include a notice of confirmation) was “sent” by mail. In *Schafer v. R.*, 2000 CarswellNat 1948, at paragraph 17, the Federal Court of Canada – Appeal Division endorsed subsection 335(1) in the context of a different notice – a notice of assessment – as follows:

That subsection sets out the manner of proof for the Minister to demonstrate that he has indeed sent the notice of assessment to the taxpayer. It clearly establishes that the onus is on the Minister to establish that he sent the notice to the respondent.

[9] Subsection 335(1) reads:

335(1) Proof of service by mail – Where, under this Part or a regulation made under this Part, provision is made for sending by mail a request for information, a notice or a demand, an affidavit of an officer of the Canada Revenue Agency, sworn before a commissioner or other person authorized to take affidavits, setting out that the officer has knowledge of the facts in the particular case, that such a request, notice or demand was sent by registered or certified mail on a named day to the person to whom it was addressed (indicating the address), and that the officer identifies as exhibits attached to the affidavit the post office certificate of registration of the letter or a true copy of the relevant portion thereof and a true copy of the request, notice or demand, is evidence of the sending and of the request, notice or demand.

[Underlining added for emphasis.]

[10] Thus, what subsection 335(1) requires as evidence that a notice was sent by mail, is an affidavit of a knowledgeable Canada Revenue Agency (CRA) official that *inter alia* has, as an exhibit, “. . . the post office certificate of registration of the letter or a true copy of the relevant portion thereof . . .”

[11] The corporate Appellant asserted through its two non-lawyer representatives that it never received a notice of confirmation pertaining to its December 22, 2016 objection to the November 2, 2016 assessment; and thus through no fault of its own was unaware of the commencement of any 90 day period for filing its Notice of Appeal.

[12] As for evidence in this matter the Respondent relies solely on an affidavit deposed to October 22, 2020 by CRA Appeals officer, M. Parolin (formerly M. Goodwin) (MP). The Respondent called no other evidence on the hearing of this motion. The Appellant called no evidence on this motion.

[13] Turning to that one item of evidence, the affidavit of MP sets forth facts within her personal knowledge, with annexed documentary exhibits, all summarized as follows. MP was the CRA Appeals officer assigned to consider on behalf of the Minister of National Revenue (Minister) the Appellant's notice of objection filed December 22, 2016 in response to the said November 2, 2016 assessment. MP concluded on behalf of the Minister that this objected-to assessment should be confirmed, and prepared a notice of confirmation accordingly.

[14] That notice of confirmation, of which a true copy is identified as Exhibit "A" of the affidavit, was signed and dated May 23, 2017. MP prepared it in the usual form as a letter from the Minister (per MP), headed "Registered", and addressed specifically to the corporate Appellant at that entity's correct civic address.

[15] Exhibit "B" of the affidavit is an internal CRA form entitled "Special Mail Services Request Form", which form MP filled out on May 23, 2017. The purpose of this document, as surmised from its various fields for completion, was to notify CRA's Surrey B.C. mailroom that the notice of confirmation, enclosed in an envelope attached to this completed form, was to be sent by registered mail. Also, on the form she was to (and did) print the name of the corporate Appellant and its address to which the item was to be sent. However, she added immediately below that address the further line, "Attention: Raad Murad". Mr. Murad is apparently the principal shareholder of the corporate Appellant, and was one of the Appellant's representatives at the hearing.

[16] MP's affidavit further provides that she placed this completed documentation in an office mail bin labeled "outgoing registered mail", for mailing by the CRA mailroom staff. In accordance with procedure, a copy of this completed CRA internal form was sent back to MP the following day (May 24, 2017, confirmed by date-stamp thereon), with an addition. The addition, added to the bottom of the form as returned, in a field headed "To be completed by the Mailroom" and date-stamped May 23, 2017, is a multi-digit "tracking number" (identified as such on the form) preceded by the letter "R". This addition does not anywhere state "Canada Post" or "registered". In her affidavit MP identifies this addition as "Canada Post registered mail item number". In oral submissions Respondent's counsel referred to this addition as an "affixed label".

[17] The affidavit's next exhibit - Exhibit "C" - is an email from Canada Post to MP dated almost two months later (July 14, 2017), having the subject line, "Inquiry - Mail item not delivered". According to the affidavit, this email responds to a message MP had sent Canada Post earlier that day "to confirm sending". This

Canada Post response was that Canada Post had opened a “service ticket” in response to MP’s “request”.

[18] The next exhibit - Exhibit “D” - is a July 31, 2017 email to MP from Canada Post Customer Service Team, “. . . regarding this Registered Letter mailed May 24/17 to Raad Murad.” It states,

Unfortunately, we have no further record of this item after the delivery attempt on May 25/17. We have tried to reach the addressee to verify receipt of this item verbally but have not been able to reach anyone or leave any messages at the telephone # provided for this customer.

[19] MP’s affidavit next provides that she, on August 2, 2017, “. . . checked Canada Post’s online tracking system to retrieve tracking details. . . .” of the notice of confirmation. Referenced as Exhibit “E” of MP’s affidavit is what MP identified as being a print-out of tracking details for this mail item. It indicates that Canada Post first “processed” the item on May 24 (not 23), 2017 and states that on the following day, “[I]tem out for delivery”. Also, for May 25, 2017 there is a further entry reading, “Notice card left indicating where and when to pick up item”.

[20] Finally, MP states in her affidavit, “The Notice of Confirmation that was sent out to the Appellant on May 23, 2017, were [*sic*] not returned to me.”

[21] The Respondent’s submission was that this affidavit established that the notice of confirmation was “sent” May 23, 2017, consequently commencing the clock ticking for the aforementioned 90 day period. The Respondent’s submission referenced two provisions of the Act. The first is subsection 301(5), noted above. It provides that the Minister is to send the person objecting a notice of confirmation by registered or certified mail. The other is subsection 334(1). It in relevant part provides that, “. . . anything sent by first class mail or its equivalent shall be deemed to have been received by the person to whom it was sent on the day it was mailed.”

[22] Having reviewed the evidence and submissions I am troubled by two aspects of the Respondent’s motion. First, there is failure to comply with a requirement specified in subsection 335(1) for evidencing that a notice was “sent by registered or certified mail”. That requirement is the inclusion as an exhibit in a CRA officer’s affidavit of, “the post office certificate of registration of the letter or a true copy of the relevant portion thereof”. In my view none of the exhibits to MP’s affidavit, individually referenced above, can reasonably be construed as being such a certificate or true copy of the relevant portion thereof.

[23] The only document that conceivably could be a candidate for being so described is the Exhibit “B” “special mail services request form”, being an internal CRA document as described above. It is not a Canada Post document, nor does it use the name Canada Post or the phrase “registered mail” (the latter apart from indicating that this internal CRA form is to be used for requesting “registered mail” up to 500 grams, or “Xpresspost”, but not “courier requests”). In particular the provided “tracking number” includes no reference to Canada Post or registered mail.

[24] I do not say this is the only way to prove that the notice of confirmation was sent by registered mail. Another way could be by the Respondent calling one or more witnesses to provide *viva voce* evidence based on personal knowledge. However here the option of bringing the necessary evidence by affidavit was utilized. And that brings subsection 335(1) into play. Perfection is not the standard in measuring MP’s affidavit against subsection 335(1) specified requirements. Regardless I cannot find that CRA’s “special mail services request form”, albeit presumably with a Canada Post “tracking number” stamped or affixed thereon, can reasonably be considered, “the post office certificate of registration of the letter or a true copy of the relevant portion thereof” per subsection 335(1). Thus subsection 335(1) has not been complied with. It specifies what Parliament intends is required, in order to prove by affidavit that a notice including a notice of confirmation has been “sent by registered mail”. That is an important piece of evidence as it commences, effective the “sent” date, the counting of a 90 day period available for the filing a notice of appeal.

[25] My second concern is that in the July 31, 2017 Canada Post email to MP (Exhibit “D”), the Canada Post Customer Service Team identifies the missing registered letter as, “. . . this Registered Letter mailed May 24/17 to Raad Murad.” The problem is, Raad Murad is not the correct taxpayer entity. Rather, the correct taxpayer entity is the corporate Appellant - Luxury Home Landscape Construction Inc. It is that corporation that is the entity to which registered mail including the subsection notice of confirmation was to have been sent. Whether that actually happened is put in doubt by the language of this Canada Post email, identifying Raad Murad as the entity to whom the registered letter was mailed. A copy of the address envelope enclosing the notice of confirmation was not put in evidence.

[26] Before leaving this point, and at the risk of belabouring the obvious, I note that subsection 301(5) provides that, “. . . the Minister shall send to the person objecting notice of the Minister’s decision [*e.g.*, to confirm an assessment] by registered or certified mail”. This provision makes clear that a notice of confirmation

is to be sent by registered or certified mail to the person named, with accompanying address, in the actual notice of confirmation itself.

[27] As an aside, I note that Canada Post cannot account for what has happened to this supposedly registered mail item, as reflected in Canada Post's July 31, 2017 email (Exhibit "D"). Of course subsection 301(5) simply requires that the Minister "send" the item. Proof of actual receipt is not required. Subsection 334(1) deems an item sent by "first class mail or its equivalent" to have been received on the same day as mailed.

[28] Given the two above-noted deficiencies I am unable to grant the Respondent's motion that the Notice of Appeal be quashed.

[29] In the absence of an appropriate legal basis for identifying a 90 day period commencement date, what is the fate of the Notice of Appeal? Per paragraph 305(5)(a), without any 90 day period being identified, nor can there be an immediately subsequent one year period for applying for extension of time to file.

[30] As this motion to quash has not succeeded, the Notice of Appeal remains - unscathed.

[31] Further, absent establishment that the notice of confirmation was "sent", the March 15, 2019 filing of the subject Notice of Appeal was in conformity with the Act. Paragraph 306(b), set out above, allows for a notice of appeal being filed any time post 180 days from the filing date of a notice of objection, provided the taxpayer had not before filing been notified of a ministerial confirmation or reassessment. That is the case here. Well more than 180 days passed from the December 22, 2016 filing of the notice of objection to the March 15, 2019 filing of the subject Notice of Appeal.

[32] The Respondent's motion to quash the Notice of Appeal filed March 15, 2019 will be dismissed, and the appeal can be set down for hearing.

Signed at Halifax, Nova Scotia this 9th day of February 2021.

"B. Russell"

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Russell J.



CITATION: 2021 TCC 4

COURT FILE NO.: 2019-949(GST)I

STYLE OF CAUSE: LUXURY HOME LANDSCAPE  
CONSTRUCTION INC. v. HER  
MAJESTY THE QUEEN

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 2, 2020

REASONS FOR JUDGMENT BY: The Honourable Justice B. Russell

DATE OF JUDGMENT: February 9, 2021

APPEARANCES:

Agents for the Appellant: Frank Failie and Raad Murad

Counsel for the Respondent: Sarah Mackenzie

COUNSEL OF RECORD:

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Firm:

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