

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160301

Docket: A-527-14

Citation: 2016 FCA 68

**CORAM: DAWSON J.A.
RYER J.A.
DEMONTIGNY J.A.**

BETWEEN:

BUHLER VERSATILE INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Winnipeg, Manitoba, on March 1, 2016.

Judgment delivered from the Bench at Winnipeg, Manitoba, on March 1, 2016.

REASONS FOR JUDGMENT OF THE COURT BY:

RYER J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Winnipeg, Manitoba, on March 1, 2016)

RYER J.A.

[1] This is an appeal from a decision of Justice Steven D'Arcy of the Tax Court of Canada (the "Judge"), dated November 18, 2014, in Docket 2012-4373(IT)G. The Judge granted a motion brought by Her Majesty the Queen (the "Crown"), pursuant to Rules 95 and 110 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a (the "*Tax Court Rules*"), for

an order compelling Buhler Versatile Inc. (the “Taxpayer”) to produce five binders of documents (the “Five Binders”).

[2] The dispute arose in the context of the Taxpayer’s appeal from an assessment, pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), dated December 2, 2008 (the “Assessment”), which disallowed the Taxpayer’s claim for certain scientific research and experimental development expenditures and investment tax credits in respect of the Taxpayer’s 2005 taxation year.

[3] In an attempt to persuade the Canada Revenue Agency Appeals Division (the “Appeals Division”) to vary or vacate the Assessment, the Taxpayer made a lengthy submission to it by correspondence dated October 21, 2011. That submission consisted of a letter signed by the Chief Financial Officer of the Taxpayer (the “CFO Letter”) and “relevant supporting documentation” that the Taxpayer provided in the Five Binders. The CFO Letter makes references to the materials in the Five Binders (Appeal Book at pages 68-70).

[4] The Appeals Division considered the CFO Letter and the Five Binders, but nonetheless confirmed the Assessment. The Five Binders were returned to the Taxpayer.

[5] In pursuing its appeal to the Tax Court of Canada, the Taxpayer prepared a List of Documents, as required by Rule 81 of the *Tax Court Rules*. In it, the Taxpayer included the CFO Letter as document number 262 (“Document Number 262”) but did not specifically mention the Five Binders.

[6] In the examination for discovery of Mr. Allan Earl Minaker, a representative of the Taxpayer, counsel for the Crown requested production of the Five Binders. On the advice of the Taxpayer's counsel, Mr. Minaker took the request under advisement. Mr. Minaker subsequently provided the following written response: "As this case is not a judicial review, all relevant documents have been provided".

[7] The Judge granted the motion on the basis that Rules 85(3) and 105(1)(a) of the *Tax Court Rules* required the Taxpayer to produce the Five Binders. In so concluding, the Judge determined that Document Number 262 included both the CFO Letter and the Five Binders.

[8] In an appeal from a decision of the Tax Court of Canada on a question of the production of documents, this Court has held that the determination is largely a fact-based inquiry that will be reviewed as a question of mixed fact and law. As such, we will intervene only if a palpable and overriding error is established (see *Canada v. Lehigh Cement Limited*, 2011 FCA 120 at paragraph 25, 417 N.R. 342).

[9] Rule 85(3) of the *Tax Court Rules* requires production at the examination for discovery of a party of any document listed in that party's list of documents under either Rule 81 or 82 of the *Tax Court Rules*, unless that document is privileged.

[10] The issue in this appeal is whether the Judge committed a palpable and overriding error when he concluded that Document Number 262 constituted a single document comprised of both the CFO Letter and the Five Binders.

[11] In our view, this conclusion was open to the Judge and he made no palpable and overriding error in reaching it. It is apparent that the CFO Letter itself makes reference to the materials in the Five Binders in a number of instances and that the CFO Letter would not have constituted a complete submission without those materials.

[12] In our view, this is sufficient to deal with the appeal. However, we wish to observe that the Taxpayer's assertion that the Judge committed an error of law by considering hearsay evidence is without merit. While counsel for the Taxpayer asserts that he made "strenuous objections" to the alleged admission of hearsay evidence, the transcript in the record reveals that no such objection was expressly made to the Judge. Moreover, as Justice Webb observed in an application made to him to determine the contents of the Appeal Book, the Taxpayer's notice of appeal to this Court similarly makes no mention of an objection to the admission of hearsay evidence. In the Crown's motion, the affidavit of Mr. Keith Chrystall was the only evidence tendered to the Judge. It was admissible by virtue of Rule 72 of the *Tax Court Rules*, which provides that affidavits on motions may be based upon information and belief provided that the basis thereof is stipulated. In any event, the evidence that the Taxpayer's counsel hoped to adduce if the Appeals Officer had been produced, would have had no bearing on the decision of the Judge that Document Number 262 consisted of both the CFO Letter and the Five Binders.

[13] For these reasons, the appeal will be dismissed with costs.

"C. Michael Ryer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-527-14

(APPEAL FROM A DECISION OF JUSTICE STEVEN D'ARCY OF THE TAX COURT OF CANADA DATED NOVEMBER 18, 2014 (DOCKET NUMBER 2012-4373(IT)G))

STYLE OF CAUSE: BUHLER VERSATILE INC. v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: WINNIPEG

DATE OF HEARING: MARCH 1, 2016

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.
RYER J.A.
DEMONTIGNY J.A.

DELIVERED FROM THE BENCH BY: RYER J.A.

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