

Federal Court of Appeal



Cour d'appel fédérale

Date: 20171212

Docket: A-454-16

Citation: 2017 FCA 245

**CORAM: DAWSON J.A.
STRATAS J.A.
RENNIE J.A.**

BETWEEN:

MANSOUR BOROUMEND

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on December 12, 2017.
Judgment delivered from the Bench at Toronto, Ontario, on December 12, 2017.

REASONS FOR JUDGMENT OF THE COURT BY:

DAWSON J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on December 12, 2017).

DAWSON J.A.

[1] The appellant taxpayer was reassessed under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) on August 25, 2008, in respect of the 2003 and 2004 taxation years. On March 14, 2016, the appellant filed a notice of appeal from the reassessment in the Tax Court of Canada. The respondent Crown then moved to quash the appeal arguing that, because a notice of confirmation was sent to the appellant on October 29, 2009, confirming the reassessments, the appeal was

filed out of time and the last day on which a request for an extension of time in which to file the notice of appeal could have been made was January 27, 2011.

[2] In thorough and thoughtful reasons cited as 2016 TCC 256, the Tax Court found that it was more likely than not that a notice of confirmation was sent to the appellant on October 29, 2009. It followed that the appeal was brought well out of time and that it was too late to seek an extension of time for filing the notice of appeal. The notice of appeal was therefore quashed.

[3] The appellant now appeals from the order of the Tax Court quashing the appeal.

[4] In our view, the Tax Court made no palpable and overriding error of fact or mixed fact and law, and no error of law. The Tax Court's finding of fact that the notice of confirmation was most probably mailed on October 29, 2009, was amply supported by the evidence, as detailed by the Tax Court at paragraphs 22 to 24 of its reasons. Nor did the Tax Court err in its interpretation of Rule 44(2) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a.

[5] Both in the Tax Court and in this Court the appellant argued that because the Crown had not yet filed a reply to his notice of appeal, and because the Court had not yet granted an extension of time to the Crown to file its reply, pursuant to Rule 44(2) the facts pleaded in the appellant's notice of appeal must be presumed to be true. The notice of appeal asserted that the appellant did not receive a notice of confirmation for either taxation year.

[6] The Tax Court rejected this submission, finding that Rule 44(2) has potential application where:

- i. no reply has been filed in the Tax Court within the permitted 60-day period and no extension of time for filing a reply has been granted;
- ii. no reply has been filed within the 60-day period, an extension of time has been granted but no reply was filed within the extended period for filing; or
- iii. no reply has been filed within the 60-day period, and the Crown has not applied within that 60-day period for an extension of time to file a reply.

[7] In the present case, the Crown was not in any of these situations because it had moved on a timely basis for an extension of time to file a reply and the Court had not yet ruled on that request.

[8] We agree with the Tax Court's interpretation of Rule 44(2). The presumption that, if a reply is not filed within one of the periods specified in Rule 44(1), the allegations of fact contained in a notice of appeal are presumed to be true could not operate unless the Tax Court had previously rejected the Crown's timely request for an extension of time to file a reply, if required.

[9] It follows that the appeal will be dismissed with costs.

“Eleanor R. Dawson”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-454-16

STYLE OF CAUSE: MANSOUR BOROUMEND v.
HER MAJESTY THE QUEEN

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 12, 2017

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.
STRATAS J.A.
RENNIE J.A.

DELIVERED FROM THE BENCH BY: DAWSON J.A.

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