Federal Court of Appeal | Cour d'appel fédérale

Date: 20230511

Docket: A-1-22

Citation: 2023 FCA 94

CORAM: **GLEASON J.A.**
WOODS J.A.
MACTAVISH J.A.

BETWEEN:

SATNAM MAND

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on May 9, 2023.
Judgment delivered at Toronto, Ontario, on May 11, 2023.

REASONS FOR JUDGMENT BY: GLEASON J.A.
CONCURRED IN BY: WOODS J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellant appeals from the order of the Tax Court of Canada in *Mand v. H.M.T.Q.* (6 December 2021), Ottawa 2020-2117(IT)G (TCC) (*per* Lyons, J.) (issued following oral reasons delivered on November 30, 2021). In the order under appeal, the Tax Court granted the respondent's motion, quashed the appellant's appeals for the 2007 and 2008 taxation years, and awarded the respondent $7500.00 in costs without hearing from the parties on the issue of costs.

[2] The issue before the Tax Court was whether timely notices of objection had been served by the appellant for the 2007 and 2008 taxation years. This is a prerequisite for filing a valid appeal under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the ITA).

[3] The Tax Court considered the evidence presented by both parties. The appellant submitted the affidavit of a bookkeeper who attested to the fact that she had mailed the relevant notices of objection within the timeline provided by the ITA. The respondent submitted the affidavit of an officer of the Canada Revenue Agency (the CRA), made pursuant to subsection 244(10) of the ITA, to the effect that he was unable to find that the relevant notices of objection were filed within the time allowed.

[4] The Tax Court preferred the respondent's evidence, finding that the CRA officer's evidence was reliable whereas the bookkeeper's evidence was not credible. Accordingly, the Tax Court concluded that it was more likely than not that the appellant did not properly serve the notices of objection for the relevant taxation years in a timely fashion.

[5] The appellate standard of review applies to this appeal. Therefore, we can intervene only if the Tax Court erred in law or made a palpable and overriding error of fact or of mixed fact and law where there is no extricable legal issue (*Housen v. Nikolaisen*, 2002 SCC 33, 211 D.L.R. (4th) 577 at paras. 25, 37).

[6] Here, the parties agree that the Tax Court erred in law in making the costs award without hearing from them on the issue of costs. They further agree that, in the event this appeal is

dismissed on the merits, the order of the Tax Court should nonetheless be varied to provide for a lump sum costs award of $3000.00.

[7] I agree with the parties that it was not open to the Tax Court to have awarded $7500.00 in costs without affording the parties the opportunity to make submissions on the issue.

[8] For the reasons that follow, I would dismiss the balance of this appeal and thus would vary the Tax Court's costs award to provide for costs before the Tax Court in the lump sum all-inclusive amount of $3000.00, which I concur is appropriate given the issues that were before that Court.

[9] Turning to the merits of this appeal, the Tax Court's findings were substantially findings of fact or mixed fact and law, reviewable for palpable and overriding error.

[10] The palpable and overriding standard is an exacting one; "palpable" means plainly seen, and "overriding" means determinative to the conclusion reached in the court below. As was stated by this Court in paragraph 46 of *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 4 B.L.R. (5th) 31, and adopted by the Supreme Court of Canada in *Benhaim v. St-Germain*, 2016 SCC 48, 402 D.L.R. (4th) 579 at paras. 37–38, "[w]hen arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall".

[11] I see no palpable and overriding error in the Tax Court's findings. Contrary to what the appellant submits, it was not necessary for the respondent to have called evidence of its mailroom practices. They were not relevant in the case at bar because what was at issue was whether the notices of objection were mailed to the CRA in a timely fashion and the appellant was found to have provided no credible evidence of their mailing.

[12] Moreover, the Tax Court's conclusion on the bookkeeper's lack of credibility is unassailable, particularly in light of the fact that the bookkeeper signed copies of the notices, effectively backdating them, and did not disclose this to the CRA when she resent the notices in 2014 as part of her submission claiming that they had been sent in 2012.

[13] In light of the Tax Court's determination that the appellant had provided no credible evidence that the notices were mailed in a timely fashion, it was open to the Tax Court to have reached a different conclusion than was reached in *Carcone v. The Queen*, 2011 TCC 550, [2012] 2 C.T.C. 2043 and *Poulin v. The Queen*, 2013 TCC 104, 227 A.C.W.S. (3d) 1209, upon which the appellant relies.

[14] Nor did the Tax Court commit a reviewable error in making a credibility assessment based on affidavit evidence and the transcript of the cross-examinations on the affidavits.

[15] Rule 53(3)(b) of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a, allows a party to move to quash an appeal on the basis that a condition precedent to instigating an appeal has not been met, which would be the case if a timely notice of objection was not filed. Rules 71 to 76 provide that, unless the Tax Court orders otherwise, motions are to be determined based on affidavit evidence and transcripts of cross-examinations.

[16] The appellant was aware that the respondent was questioning the credibility of the appellant's affiant, yet the appellant did not ask the Tax Court to hear *via voce* evidence. In light of the foregoing, it was open to the Tax Court to have proceeded in the manner it did.

[17] In short, because the appellant raised no objection before the Tax Court as to its manner of proceeding, she cannot claim to have been denied procedural fairness for the first time before this Court. As noted by this Court at paragraph 17 of *Canada v. Raposo,* 2019 FCA 208, [2019] G.S.T.C. 50, it is well established that individuals who believe they have been denied procedural fairness must raise the issue at the first opportunity, failing which they will generally be found to have waived their right to raise the issue of procedural fairness.

[18] I would therefore allow this appeal, but only to the extent of varying the order of the Tax Court to provide for costs before that Court in the lump sum all-inclusive amount of $3000.00. As for the costs of this appeal, I would award them to the respondent, who was successful on the merits. The parties propose that they should be fixed in the all-inclusive amount of $2000.00, which I agree is an appropriate amount.

"Mary J.L. Gleason"
J.A.

"I agree.
Judith Woods"

"I agree.
Anne L. Mactavish"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-1-22

APPEAL FROM THE ORDER OF THE HONOURABLE MADAM KATHLEEN LYONS, OF THE TAX COURT OF CANADA DATED DECEMBER 6, 2021, DOCKET: 2020-2117(IT)G

STYLE OF CAUSE:	SATNAM MAND v. HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	MAY 9, 2023
REASONS FOR JUDGMENT BY:	GLEASON J.A.
CONCURRED IN BY:	WOODS J.A. MACTAVISH J.A.
DATED:	May 11, 2023

APPEARANCES:

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