Federal Court of Appeal | Cour d'appel fédérale

Date: 20231110

Docket: A-28-21

Citation: 2023 FCA 222

CORAM: **WEBB J.A.**
RENNIE J.A.
BIRINGER J.A.

BETWEEN:

ROSS JOHNSON

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on October 12, 2023.

Judgment delivered at Ottawa, Ontario, on November 10, 2023.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RENNIE J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the decision of the Tax Court of Canada (2019 TCC 13) dismissing Mr. Johnson's application for an extension of time to file an appeal to the Tax Court under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the ETA).

[2] For the reasons that follow, I would dismiss this appeal.

I. Background

[3] Mr. Johnson is Onkwehon:we and a member of the Six Nations of the Grand River Territory. He lives on a reserve and operates a wholesale business using the name R.J. Wholesaler.

[4] In 2005, Mr. Johnson imported cigarettes from Germany. He paid the following amounts of excise tax, duty and GST in relation to the importation of the cigarettes:

Excise tax	$355,836.99
Duty	$8,250.94
GST	$30,106.68
Total:	$394,194.61

[5] By letter dated May 23, 2007, the Canada Border Services Agency (CBSA) informed Mr. Johnson that his company was selected for a Customs Compliance Verification. The verification period for the audit included 2005, when the cigarettes referred to above were imported. It appears that a subsequent letter dated June 19, 2007 was sent to Mr. Johnson by the CBSA but this letter was not included as an exhibit presented to the Tax Court.

[6] In a letter dated September 10, 2007 (a copy of which was an exhibit at the Tax Court hearing) Mr. Johnson responded to the CBSA letter dated June 19, 2007. In his letter he referred

to the "re-determination and subsequent revised amounts owing" and submitted that, in his view, "the re-determination is incorrect on the following points:

- … the onus for excise and duty falls upon the manufacturer of the product as a required 'paid at the source' cost.

- The product … came into the country with 'Canada Duty Paid' markings on the packaging.

- All five (5) shipments were inspected by Canada Customs at the point of entry and all were cleared through Customs by Livingston International at the rates of excise, duty and GST as per the original invoices and billings.

- As a proprietary business located on a First Nation community in Canada [there were rights and exemptions that would eliminate his obligation to pay any taxes or duties]".

[7] It appears that no further action was taken by Mr. Johnson until February 2017, almost ten years after his letter dated June 19, 2007. By letter dated February 8, 2017 Mr. Johnson wrote to the Canada Revenue Agency (CRA) to request a full reimbursement of $394,536.15 that he submitted was paid as excise tax, duty and GST. Although his letter referred to $394,536.15 as the total amount of excise tax, duty and GST that he paid, there are several references to the individual amounts of excise tax, duty and GST as set out in paragraph 4 above, which total $394,194.61. The discrepancy is not relevant for this appeal.

[8] Mr. Johnson submitted that, since he is a member of the Six Nations of the Grand River Territory, no excise tax, duty or GST should have been imposed on him (personally or as the sole proprietor of his wholesale business).

[9] The CRA, in a letter dated March 31, 2017, responded by indicating that he is not exempt from the duties and taxes that were imposed on his importation of cigarettes.

[10] Mr. Johnson then requested a rebate of GST and by notice of assessment dated December 21, 2017, this request was denied. The notice of assessment indicates that it was issued under the ETA. This is the only assessment that is included in the record before this Court. The affidavit of the appeals officer with the CRA (a copy of which is in the record) confirms that no other assessment was issued under the ETA, the *Excise Act, 2001*, S.C. 2002, c. 22 (the EA) or the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.) (the CA) to Mr. Johnson for any taxation period in 2005.

[11] Mr. Johnson brought an application before the Tax Court to extend the time within which he could file an appeal to the Tax Court in connection with the letter from the CRA dated March 31, 2017 (paragraph 2 of the reasons of the Tax Court Judge). At the conclusion of the Tax Court hearing, the Tax Court Judge requested written submissions from the parties concerning Mr. Johnson's rebate application (paragraph 16 of the reasons of the Tax Court Judge) and the subsequent notice of assessment dated December 21, 2017. Following the receipt of the written submissions, the Tax Court Judge made the following findings:

> [20] Since the Notice of Assessment is dated December 21, 2017, the Applicant had no more than twelve months to file the Application to extend the time to file an appeal. I am satisfied that he has done so …

[12] In effect, it appears that the Tax Court Judge allowed Mr. Johnson to amend his application to include an application to extend the time to appeal to the Tax Court in relation to the assessment dated December 21, 2017.

II. Decision of the Tax Court

[13] The Tax Court Judge started his reasons by noting that:

> [1] This matter involves an application to extend time within which an appeal may be instituted under the provisions of the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the "ETA"), the *Excise Act, 2001*, S.C. 2002, c. 22 (the "EA") and the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.) (the "CA") for the purposes hereof, I have assumed that the Application was filed under the provisions of the ETA.

[14] The Order issued by the Tax Court only refers to the ETA.

[15] The Tax Court Judge, in paragraph 12 of his reasons, found that the letter from the CRA dated March 31, 2017 simply provided an update or information to Mr. Johnson and was not a notice of assessment or reassessment. Having made this finding with respect to this letter, the Tax Court Judge then turned his attention to correspondence from almost 10 years earlier between the CBSA and Mr. Johnson.

[16] The Tax Court Judge found, at paragraph 12 of his reasons, that “[i]t is more likely that the letter from CBSA dated June 19, 2007 (a copy of which was not provided to the Court) was a determination by CBSA. If that was the case, then the Applicant's letter of September 10, 2007 may be interpreted to be a notice of objection”.

[17] The Tax Court Judge concluded, based on his reading of section 306 of the ETA, that Mr. Johnson only had 180 days from the date of his "notice of objection" (dated September 10, 2007) to file an appeal. Since no notice of appeal was filed within this 180-day-period and no application to extend the time to file a notice of appeal was filed within one year from the end of this 180-day-period, the time to appeal the "determination" could not be extended.

[18] The Tax Court Judge then considered the application for a rebate of the GST that was paid. Since the assessment arising from the rebate application was dated December 21, 2017, in the Tax Court Judge's view, the application for an extension of time to appeal to the Tax Court was filed within the time limits set out in the ETA. However, he found that Mr. Johnson had no reasonable prospect of success, as his application for a rebate was not made within the two year time period for requesting a rebate as set out in subsection 261(3) of the ETA.

[19] As a result, Mr. Johnson's application for an extension of time to file an appeal to the Tax Court was dismissed.

III. Issues and Standard of Review

[20] Mr. Johnson did not address the Tax Court Judge's decision to dismiss his application for an extension of time to file an appeal to the Tax Court under the ETA. Rather, Mr. Johnson's submissions only related to why, in his view, he should not have been subject to any excise tax, duty or GST. This appeal is, however, an appeal from the Order of the Tax Court dismissing his application for an extension of time to file an appeal to the Tax Court under the ETA. The only

issues that will be addressed are those that relate to the Tax Court Judge's decision to dismiss this application.

[21] A reading of the reasons of the Tax Court Judge reveals several issues that need to be addressed. In particular, the following issues arise from his reasons:

(a) whether a notice of objection could be filed under the ETA in relation to a determination made by the CBSA;

(b) whether section 306 of the ETA imposes a 180-day-period following the filing of a notice of objection within which a taxpayer must file a notice of appeal to the Tax Court; and

(c) whether a taxpayer can appeal an assessment made under the ETA without first filing a notice of objection.

[22] Since these issues all relate to the interpretation of the ETA, the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33).

IV. Analysis

[23] Mr. Johnson's only submissions in his appeal to this Court related to the merits of his appeal — why, in his view, as a member of the Six Nations of the Grand River Territory, he was exempt from paying any duty or taxes in relation to his importation of cigarettes in 2005. However, this appeal is not about whether Mr. Johnson is exempt from paying any duty or taxes.

Rather, the issue in this appeal is whether Mr. Johnson has the right to proceed to the Tax Court to make his arguments with respect to whether he is exempt from paying any duty or taxes on this importation of cigarettes.

[24] This is an appeal from an Order of the Tax Court dismissing his application for an extension of time to commence an appeal to that Court under the ETA. Paragraph 52(*c*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 limits the powers of this Court in this appeal to dismissing the appeal, giving the decision that the Tax Court should have given, or referring the matter back to the Tax Court with such directions as are considered appropriate. Since the application before the Tax Court was for an extension of time to commence an appeal under the ETA, this is the only matter that we can address in this appeal. We cannot address the merits of Mr. Johnson's argument that he is exempt from paying any duty or taxes in relation to his importation of cigarettes in 2005.

[25] In his reasons, the Tax Court Judge first noted that Mr. Johnson was applying for an extension of time to appeal under the ETA, the EA and the CA. He then assumed that the application was filed under the ETA. Each statute, however, has its own requirements to commence an appeal. Since the Tax Court Judge acknowledged that Mr. Johnson was applying for an extension of time under each statute (the ETA, the EA and the CA) he should not have assumed that the application was only made under the ETA.

[26] The Tax Court Judge's assumption that the application was only made under the ETA is reflected in the Order, which only refers to the ETA. An appeal to this Court is from the Order

and not the reasons (*Stubicar v. Canada*, 2020 FCA 66, at para. 77). Since the Order dismissed his application for an extension of time to file an appeal to the Tax Court under the ETA, this appeal is restricted to an appeal from the dismissal of his application for an extension of time to file an appeal under the ETA to the Tax Court.

[27] The claim that Mr. Johnson is attempting to bring before the Tax Court is a private, personal claim as he is seeking a return of the amounts that he has paid as excise tax, duty and GST on his importation of cigarettes in 2005. This Court, in *Horseman v. Canada*, 2018 FCA 119, confirmed that procedural and jurisdictional provisions applicable to the ETA will apply even if a claim is based on constitutional rights and treaty rights of Indigenous peoples:

> [4] … In private, personal claims such as this, procedural and jurisdictional provisions apply and must be obeyed even where the constitutional rights and treaty rights of Indigenous peoples are asserted …

[28] Therefore, the procedural and jurisdictional provisions applicable to bringing an appeal to the Tax Court under the ETA must be considered and applied.

A. *Tax Court of Canada Act*

[29] The Tax Court is a statutory court created by the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2. The jurisdiction of the Tax Court is derived from section 12 of this Act. In particular subsection 12(1) of this Act bestows jurisdiction on the Tax Court to hear appeals arising under a number of statutes:

12 (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part IX of the *Excise Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act*, Part V.1 of the *Customs Act*, the *Income Tax Act*, the *Employment Insurance Act*, the *Air Travellers Security Charge Act*, the *Excise Act, 2001*, the *Softwood Lumber Products Export Charge Act, 2006*, the *Disability Tax Credit Promoters Restrictions Act*, Part 1 of the *Greenhouse Gas Pollution Pricing Act*, the *Underused Housing Tax Act* and the *Select Luxury Items Tax Act* when references or appeals to the Court are provided for in those Acts.	**12 (1)** La Cour a compétence exclusive pour entendre les renvois et les appels portés devant elle sur les questions découlant de l'application du *Régime de pensions du Canada*, de la *Loi sur l'exportation et l'importation de biens culturels*, de la partie IX de la *Loi sur la taxe d'accise*, de la *Loi sur la sécurité de la vieillesse*, de la *Loi de l'impôt sur les revenus pétroliers*, de la partie V.1 de la *Loi sur les douanes*, de la *Loi de l'impôt sur le revenu*, de la *Loi sur l'assurance-emploi*, de la *Loi sur le droit pour la sécurité des passagers du transport aérien*, de la *Loi de 2001 sur l'accise*, de la *Loi de 2006 sur les droits d'exportation de produits de bois d'oeuvre*, de la *Loi sur les restrictions applicables aux promoteurs du crédit d'impôt pour personnes handicapées*, de la partie 1 de la *Loi sur la tarification de la pollution causée par les gaz à effet de serre*, de la *Loi sur la taxe sur les logements sous-utilisés* et de la *Loi sur la taxe sur certains biens de luxe*, dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

[30] While there are a number of statutes listed in subsection 12(1) of the *Tax Court of Canada Act*, an appeal to the Tax Court under these statutes can only be brought "when references or appeals to the Court are provided for in those Acts". Therefore, the right to appeal to the Tax Court under any particular statute (including the ETA) that is listed in this subsection must be found within the provisions of that particular statute.

B. *Appeals to the Tax Court under Sections 302 and 306 of the ETA*

[31] Sections 302 and 306 of the ETA provide for appeals to the Tax Court:

302 Where a person files a notice of objection to an assessment and the Minister sends to the person a notice of a reassessment or an additional assessment, in respect of any matter dealt with in the notice of objection, the person may, within ninety days after the day the notice of reassessment or additional assessment was sent by the Minister,	**302** La personne, ayant présenté un avis d'opposition à une cotisation, à qui le ministre a envoyé un avis de nouvelle cotisation ou de cotisation supplémentaire concernant l'objet de l'avis d'opposition peut, dans les 90 jours suivant cet envoi :
(*a*) appeal therefrom to the Tax Court; or	***a*)** interjeter appel devant la Cour canadienne de l'impôt;
(*b*) where an appeal has already been instituted in respect of the matter, amend the appeal by joining thereto an appeal in respect of the reassessment or additional assessment in such manner and on such terms as the Tax Court directs.	***b*)** si un appel a déjà été interjeté, modifier cet appel en y joignant un appel concernant la nouvelle cotisation ou la cotisation supplémentaire, en la forme et selon les modalités fixées par cette cour.
…	[…]
306 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	**306** La personne qui a produit un avis d'opposition à une cotisation aux termes de la présente sous-section peut interjeter appel à la Cour canadienne de l'impôt pour faire annuler la cotisation ou en faire établir une nouvelle lorsque, selon le cas :
(*a*) the Minister has confirmed the assessment or has reassessed, or	***a*)** la cotisation est confirmée par le ministre ou une nouvelle cotisation est établie;

(*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,	***b*)** un délai de 180 jours suivant la production de l'avis est expiré sans que le ministre n'ait notifié la personne du fait qu'il a annulé ou confirmé la cotisation ou procédé à une nouvelle cotisation.
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 or has reassessed.	Toutefois, nul appel ne peut être interjeté après l'expiration d'un délai de 90 jours suivant l'envoi à la personne, aux termes de l'article 301, d'un avis portant que le ministre a confirmé la cotisation ou procédé à une nouvelle cotisation.

[32] Filing a notice of objection to an assessment is a condition precedent to filing an appeal to the Tax Court under either section 302 or section 306 of the ETA (*Li v. Canada*, 2011 TCC 416, at paras. 3-4). Section 302 also has the additional requirement that after filing the notice of objection, the Minister of National Revenue (Minister) must have sent "to the person a notice of a reassessment or an additional assessment, in respect of any matter dealt with in the notice of objection".

[33] In this case, the Tax Court Judge found that Mr. Johnson's letter of September 10, 2007 was a "notice of objection" to a "determination" made by the CBSA in a letter dated June 19, 2007 (a copy of which was not produced as an exhibit at the Tax Court hearing). It is difficult to rationalize the Tax Court Judge's finding that the CBSA made a "determination" when he did not have a copy of the letter in which this "determination" was allegedly made. In any event, nothing turns on whether the CBSA made a "determination" in this letter of June 19, 2007.

[34] A notice of objection under the ETA is an objection to an assessment made by the Minister, it is not an objection to a "determination" made by the CBSA:

301(1.1) Any person who has been assessed and who objects to the assessment may, within ninety days after the day notice of the assessment is sent to the person, file with the Minister a notice of objection in the prescribed form and manner setting out the reasons for the objection and all relevant facts.	**301(1.1)** La personne qui fait opposition à la cotisation établie à son égard peut, dans les 90 jours suivant le jour où l'avis de cotisation lui est envoyé, présenter au ministre un avis d'opposition, en la forme et selon les modalités déterminées par celui-ci, exposant les motifs de son opposition et tous les faits pertinents.

[35] The Tax Court Judge's finding that Mr. Johnson filed a notice of objection under the ETA to the "determination" made by the CBSA is an error. There is no right to file a notice of objection under the ETA to a "determination" by the CBSA.

[36] Mr. Johnson's letter dated September 10, 2007 was not a notice of objection to an assessment made by the Minister since, as of September 10, 2007, no assessment had been issued under the ETA in relation to the importation of cigarettes by Mr. Johnson in 2005.

[37] Since Mr. Johnson's letter dated September 10, 2007 was not a notice of objection under the ETA, Mr. Johnson did not have a right of appeal to the Tax Court under either section 302 or section 306 of the ETA. There was, therefore, no basis to consider his application to extend the time to appeal based on his letter of September 10, 2007.

[38] In any event, the Tax Court Judge also erred in his reading of section 306 of the ETA. The Tax Court Judge found that Mr. Johnson had to file an appeal within 180 days of the filing of his “notice of objection”:

> [14] … In this instance, the "notice of objection", is dated September 10, 2007 meaning that the Applicant had 180 days or until on or about March 10, 2008 to file an appeal with this Court. The Applicant also had one year to seek an extension of time to file an appeal: subsections 305(5) of the ETA, 199(5) of the EA and 97.52(5) of the CA.
>
> [15] While I am prepared to accept that the letter of September 10, 2007 was a valid Notice of Objection, it is apparent that the Applicant neither filed an appeal nor sought an extension of time to do so in accordance with the mandatory time periods noted above. And since these time periods have been established by Parliament, this Court has neither the discretion nor the authority to accept the Notice of Appeal as filed nor to grant an extension of time to do so.

[39] Section 306 of the ETA does not provide that a person must file an appeal within 180 days of filing a notice of objection. Rather, paragraph 306(*b*) of the ETA grants a person a right to appeal after 180 days have elapsed, if the Minister has not confirmed the assessment, vacated the assessment or reassessed. It is a mandatory waiting period and not a limitation period within which a person must file a notice of appeal. The limitation period is found in the concluding part of paragraph 306(*b*) of the ETA — an appeal must be filed within 90 days of the Minister sending the notice under section 301 of the ETA that:

> (a) the assessment is confirmed; or
>
> (b) the Minister has reassessed the person.

[40] With respect to the assessment issued on December 21, 2017 following the application for a rebate of the GST paid in 2005, the Tax Court Judge erred by considering Mr. Johnson's application as an application to extend the time to appeal to the Tax Court. As noted above, filing a notice of objection is a condition precedent to appealing to the Tax Court. Absent the filing of a notice of objection, there is no right to appeal to the Tax Court. Since there is no indication that Mr. Johnson filed a notice of objection to the assessment issued on December 21, 2017, he did not have the right to appeal to the Tax Court. Therefore, there is no basis to consider his application as an application to extend the time to file an appeal to the Tax Court since he did not have a right of appeal to the Tax Court under either section 302 or section 306 of the ETA.

[41] Even though this appeal is only from the Order dismissing Mr. Johnson's application for an extension of time to file an appeal to the Tax Court under the ETA, since the Tax Court Judge stated that Mr. Johnson was also seeking an extension of time under the EA and the CA, it is worth noting the rights of appeal to the Tax Court that arise under these statutes. As well, although the Tax Court Judge did not refer to section 216 of the ETA, the right of appeal to the Tax Court under this section will be addressed.

C. *Appeals to the Tax Court under the EA*

[42] Similar to the ETA, the EA provides a right to appeal to the Tax Court if a person has filed a notice of objection to an assessment made under the EA. Subsection 198(1) of the EA sets out this right of appeal:

198 (1) Subject to subsection (2), a person who has filed a notice of objection to an assessment may appeal to the Tax Court to have the assessment vacated or a reassessment made after	**198 (1)** Sous réserve du paragraphe (2), la personne qui a produit un avis d'opposition à une cotisation peut interjeter appel à la Cour de l'impôt pour faire annuler la cotisation ou en faire établir une nouvelle lorsque, selon le cas :
(*a*) the Minister has confirmed the assessment or has reassessed; or	***a*)** la cotisation est confirmée par le ministre ou une nouvelle cotisation est établie;
(*b*) 180 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.	***b*)** un délai de cent quatre-vingts jours suivant la production de l'avis a expiré sans que le ministre ait notifié la personne du fait qu'il a annulé ou confirmé la cotisation ou procédé à une nouvelle cotisation.

[43] The only notice of assessment in the record is the notice of assessment issued under the ETA in response to Mr. Johnson's request for a rebate of the GST. The affidavit of the appeals officer with the CRA confirms that no assessment was issued and no notice of objection was filed in relation to any taxes imposed against Mr. Johnson under the EA for any taxation period in 2005. As there is no indication that Mr. Johnson was assessed under the EA (or, for that matter, that he filed any notice of objection to any assessment issued under the EA) in relation his importation of cigarettes in 2005, there would be no basis for an appeal to the Tax Court.

D. *Appeals to the Tax Court under the CA*

[44] Subsection 12(1) of the *Tax Court of Canada Act* provides that the jurisdiction of the Tax Court to hear appeals under the CA is limited to matters arising under Part V.1 of that Act.

[45] Section 97.53 of the CA (which is in Part V.1 of the CA) provides a right of appeal to the Tax Court in relation to an assessment issued under Part V.1, if a notice of objection to that assessment was filed. Section 97.44 of the CA (which is in Part V.1) grants the Minister the right to assess a person under section 97.28 or 97.29 of the CA. Sections 97.28 and 97.29 of the CA are collection actions that may be taken to collect unpaid amounts — section 97.28 is a garnishment provision and section 97.29 is a provision similar to section 160 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) which allows the Minister to assess a non-arm's length transferee of property for the unpaid amounts of the transferor, to the extent that the transferee did not pay fair market value for the property acquired.

[46] The rights to appeal to the Tax Court under Part V.1 of the CA are limited to collection matters. Since Mr. Johnson's attempted appeal to the Tax Court does not relate to any collection matter (the amounts have already been paid by Mr. Johnson), there is no basis for any appeal to the Tax Court under Part V.1 of the CA.

[47] Subsection 12(3) of the *Tax Court of Canada Act* also provides that the Tax Court has jurisdiction in relation to questions that are referred to it under section 97.58 of the CA (which is also in Part V.1). However, this section only contemplates questions on an assessment or a proposed assessment being submitted following an agreement in writing between the Minister and another person:

97.58 (1) If the Minister and another person agree in writing that a question arising under this Part, in respect of any assessment or	**97.58 (1)** La Cour canadienne de l'impôt doit statuer sur toute question portant sur une cotisation, réelle ou projetée, découlant de l'application

proposed assessment, should be determined by the Tax Court of Canada, that question shall be determined by that Court.	de la présente partie, que le ministre et une autre personne conviennent, par écrit, de lui soumettre.

[48] There is no assessment or proposed assessment under Part V.1 of the CA in relation to the importation by Mr. Johnson of cigarettes in 2005 nor is there any agreement on the referral of any question to the Tax Court. Therefore, there is no basis for any referral to the Tax Court under this section 97.58.

E. *Appeals to the Tax Court under section 216 of the ETA*

[49] Subsection 216(5) of the ETA contemplates a right of appeal to the Tax Court from a decision of the President of the CBSA:

216(5) The provisions of this Part and of the *Tax Court of Canada* Act that apply to an appeal taken under section 302 apply, with any modifications that the circumstances require, to an appeal taken under subsection 67(1) of the *Customs Act* from a decision of the President of the Canada Border Services Agency made under section 60 or 61 of that Act in a determination of the tax status of goods as if the decision of the President were a confirmation of an assessment or a reassessment made by the Minister under subsection 301(3) or (4) as a consequence of a notice of objection filed under subsection 301(1.1) by the person to whom the President is required to give notice under section	216(5) Les dispositions de la présente partie et de la *Loi sur la Cour canadienne de l'impôt* concernant les appels interjetés en vertu de l'article 302 s'appliquent, avec les adaptations nécessaires, aux appels interjetés en vertu du paragraphe 67(1) de la *Loi sur les douanes* d'une décision du président de l'Agence des services frontaliers du Canada rendue conformément aux articles 60 ou 61 de cette loi quant au classement de produits, comme si cette décision était la confirmation d'une cotisation ou d'une nouvelle cotisation établie par le ministre en application des paragraphes 301(3) ou (4) par suite d'un avis d'opposition présenté aux termes du paragraphe 301(1.1) par la personne que le président est tenu

60 or 61 of the *Customs Act*, as the case may be, of the decision.	d'aviser de la décision selon les articles 60 ou 61 de la *Loi sur les douanes*.

[50] This subsection only applies if there is "a decision of the President of the Canada Border Services Agency made under section 60 or 61 of that Act in a determination of the tax status of goods". The expression "determination of the tax status of goods" is defined in subsection 216(1) of the ETA:

216 (1) In this section, determination of the tax status of goods means a determination, re-determination or further re-determination that the goods are, or are not, included in Schedule VII.	**216 (1)** Au présent article, classement s'entend du classement tarifaire de produits, de la révision de ce classement ou du réexamen de cette révision, effectué en vue d'établir si les produits sont inclus ou non à l'annexe VII.

[51] Therefore, the right to appeal to the Tax Court is limited to a determination (or re-determination) that particular goods are, or are not, included in Schedule VII to the ETA. It is not a general determination of the tax status of any particular goods nor is it a determination of whether a particular person is exempt from taxation.

[52] Various goods are described in the paragraphs of Schedule VII to the ETA. Paragraph 1 of Schedule VII refers to goods classified under certain listed headings or subheadings of Chapter 98 of Schedule I to the *Customs Tariff*, S.C. 1997, c. 36. Chapter 98 of this schedule is identified as "Special classification provisions - non-commercial".

[53] It should be noted that if the President of the CBSA makes a decision as contemplated by subsection 216(5) of the ETA, it would be deemed to be "a confirmation of an assessment or a reassessment made by the Minister under subsection 301(3) or (4) as a consequence of a notice of objection filed under subsection 301(1.1)". Subsection 216(5) of the ETA provides that the appeal provisions of section 302 of the ETA are applicable. Section 302 sets out a limitation period of 90 days to file an appeal to the Tax Court. It should also be noted that section 305 of the ETA (which grants a person the right to apply for an extension of time to file an appeal) only refers to a failure to file an appeal under section 306 of the ETA.

[54] In the matter that is before this Court, the Tax Court Judge, in paragraph 12 of his reasons, found that "[i]t is more likely that the letter from CBSA dated June 19, 2007 (a copy of which was not provided to the Court) was a determination by CBSA". In order for this letter to trigger a right of appeal under subsection 216(5) of the ETA, this "determination by the CBSA" would have to be a decision made by the President of the CBSA under section 60 or 61 of the CA in a determination of the tax status of goods, *i.e.* whether the goods were or were not included in Schedule VII of the ETA.

[55] There is no indication that Mr. Johnson was claiming that the cigarettes in issue in this matter were included in Schedule VII of the ETA or that any determination of whether the cigarettes were or were not included in this Schedule was made by the President of the CBSA. Mr. Johnson's submissions in his letter to the CBSA dated September 10, 2007 do not reflect any argument that the cigarettes that he imported in 2005 were included in Schedule VII to the ETA. There is also no indication in his letter that he was responding to a decision of the President of

the CBSA made under section 60 or 61 of the CA in a determination of whether the cigarettes were, or were not, included in Schedule VII of the ETA.

[56] There is also no indication that Mr. Johnson was even applying for an extension of time to appeal to the Tax Court from the June 19, 2007 letter from the CBSA. The Tax Court Judge, in paragraph 2 of his reasons, identified the document that formed the basis for Mr. Johnson's application for an extension of time:

> [2] The extension of time to file an appeal was sought in connection with a letter from the Canada Revenue Agency ("CRA") dated March 31, 2017.

[57] The Tax Court Judge also noted that it became apparent, at the conclusion of the hearing, that Mr. Johnson, in 2017, had applied for a rebate of the GST that he had paid. Therefore, the only documents that formed the basis for Mr. Johnson's application (or which became part of his application) were the letter from the CRA dated March 31, 2017 and the assessment dated December 21, 2017 made by the Minister in response to his rebate application.

[58] There is no indication that Mr. Johnson was applying for an extension of time to appeal to the Tax Court from the CBSA letter dated June 19, 2007. This could explain why a copy of this letter was not produced at the Tax Court hearing.

[59] Absent any indication that Mr. Johnson was seeking to appeal to the Tax Court from the 2007 CBSA letter, there is no basis for any consideration of whether he had a right of appeal arising from this letter as contemplated by subsection 216(5) of the ETA. There is therefore no

need to make any finding with respect to whether the letter from the CBSA dated June 19, 2007 reflected a decision of the President of the CBSA as contemplated by subsection 216(5) of the ETA in relation to the cigarettes imported by Mr. Johnson in 2005.

V. Conclusion

[60] As a result, I would dismiss this appeal, without costs.

"Wyman W. Webb"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-28-21
STYLE OF CAUSE:	ROSS JOHNSON v. HIS MAJESTY THE KING
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 12, 2023
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	RENNIE J.A. BIRINGER J.A.
DATED:	NOVEMBER 10, 2023

APPEARANCES:

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