Federal Court of Appeal | Cour d'appel fédérale

Date: 20140320

Docket: A-325-13

Citation: 2014 FCA 78

CORAM: **BLAIS C.J.**
GAUTHIER J.A.
MAINVILLE J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LOUISBOURG SBC, LIMITED PARTNERSHIP

Respondent

Heard at Montréal, Quebec, March 20, 2014.

Judgment delivered at Montréal, Quebec, March 20, 2014.

REASONS FOR JUDGMENT BY: BLAIS C.J.

CONCURRED IN BY: GAUTHIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

BLAIS C.J.

[1] The appellant is asking the Court to set aside the decision of Deputy Judge Masse to grant the respondent an extension of time to file a notice of objection.

[2] At issue are two notices of assessment: the first, for the December 2009 period, is dated May 3, 2010, and was posted by the respondent on the same day; the second, dated and posted by the respondent on October 1, 2010, concerns the April 2010 period.

[3] No notice of opposition was filed within the time prescribed under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (ETA).

[4] Deputy Judge Masse first concluded that the presumption of receipt provided for under subsection 334(1) of the ETA applied to the disputed notices; however, on the basis of subsection 304(5) of the ETA, he determined that since the five conditions set out in this provision had been satisfied, he could grant the requested extension.

[5] In my opinion, the judge made a palpable and overriding error in arriving at this conclusion. Consequently, his decision will be set aside, and the extensions will be cancelled.

[6] After concluding that the presumption of receipt under subsection 334(1) of the ETA applied to the two notices that had been sent, the judge examined the conditions for granting an application for an extension of time and concluded, of his own initiative, in his analysis of the impossibility to act that he had to disregard the presumption. Indeed, he concluded that the presumption should not be considered because it was a [TRANSLATION] "legal fiction" and that the impossibility to act had to be assessed irrespective of any fiction.

[7] The judge finally concluded, relying on the testimony of an employee of the respondent personally responsible for tax matters, that, since this employee had not personally received the notices in question, it had been impossible for the respondent to act.

[8] It seems clear to me that in concluding that it was mandatory for the notices of assessment to be brought to the attention of a specific representative of the respondent or to be received by such a representative in order to enforceable against the respondent, the judge deliberately added a new requirement to the ETA.

[9] I agree with the appellant's submission that the respondent's argument completely disregards the meaning that should be given to the presumption under subsection 334(1) of the ETA.

[10] Imagine for a moment if this new requirement, that is, to serve a specific person with the 40 million pieces of mail per year referred to in the decision of the deputy judge, was imposed on the appellant. Clearly, such an addition to the appellant's statutory duty cannot be accepted.

[11] Referring to Justice Stone in *Bowen*, Justice Isaac of this Court wrote as follows in *Canada v. Schafer*, 2000 CANLII 16118 (FCA):

> [I]t would be extremely difficult to administer a scheme in which a notice is sent by ordinary first class mail that would require the Minister to contact every person who has been sent a notice of assessment to ensure that they have, in fact, received it.

[12] This is all the more true given that the judge recognized that the notices might have been received by the law firm representing the respondent or by another employee of the respondent.

[13] Moreover, the "Cité de Pont Viau" case referred to by the trial judge does not apply in the present circumstances.

[14] The respondent could clearly attempt to establish that it had been impossible to act, but it also had to demonstrate that the error was not the result of its own negligence. Consequently, the manner in which the trial judge applied the facts of the case to the relevant provisions of the ETA was a palpable and overriding error. The conclusions he reached are not justified by the state of the law.

[15] The case law clearly holds that, in order to satisfy the conditions of subsection 304(5) of the ETA, the respondent had to meet each of the criteria listed there, which it clearly failed to do.

[16] The appeal will therefore be allowed, and the application for an extension for the two notices will be dismissed, with costs.

"Pierre Blais"

C.J.

"I agree.
Johanne Gauthier, J.A."

"I agree.
Robert M. Mainville, J.A."

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-325-13

(APPEAL FROM THE DECISION OF JUSTICE MASSE OF THE TAX COURT OF CANADA DATED AUGUST 16, 2013, DOCKET NO. 2012-3743(GST)APP).

STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. LOUISBOURG SBC, LIMITED PARTNERSHIP
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	MARCH 20, 2014
REASONS FOR JUDGMENT BY:	BLAIS C.J.
CONCURRED IN BY:	GAUTHIER J.A. MAINVILLE J.A.
DATED:	MARCH 20, 2014

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