Docket: 2021-2767(GST)I

BETWEEN:

OTHNIEL DEFREITAS,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on September 19, 2023, at Toronto, Ontario, and April 17, 2024, at Ottawa, Canada

Before: The Honourable Justice Ronald MacPhee

Appearances:

Agent for the Appellant:	Alexander Shaulov
Counsel for the Respondent:	Mike Chen

JUDGMENT

UPON hearing the evidence and submissions of counsel for the appellant and counsel for the respondent;

IN ACCORDANCE with the attached Reasons for Judgment, the respondent's motion to quash the appeal on the grounds that the appellant failed to object to the assessment within the time limited for doing so under the *Excise Tax Act*, RSC 1985, c. E-15, is granted. The Appeal is dismissed, with each party being responsible for their own costs.

Signed at Ottawa, Canada, this 30th day of April, 2024.

"R. MacPhee"

MacPhee J.

Citation: 2024 TCC 52
Date: 20240426
Docket: 2021-2767(GST)I

BETWEEN:

OTHNIEL DEFREITAS,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR JUDGMENT

MacPhee J.

[1] In 2015 the appellant, Mr. Othniel Defreitas applied for a GST/HST new housing rebate with respect to 3 Matthewson Avenue, Bradford, Ontario L3Z 0P3. The Minister of National Revenue ("Minister") denied the rebate. Mr. Defreitas appealed the denial to the Tax Court. As part of the Notice of Reply, the respondent brought a preliminary motion to quash the appeal on the grounds that the preconditions for filing the appeal were not met. Specifically, the respondent submits that Mr. Defreitas failed to object to the assessment within the time limit for doing so, failed to apply for an extension of time to object within the time limit for doing so and is now out of time to make such an application. Since objecting to an assessment is a precondition to appealing the assessment to this Court, the respondent submits that the appeal should be quashed.

I. ISSUE

[2] At this point, the only issue before the Court is on what date was the Notice of Assessment ("NOA") sent to Mr. Defreitas. The respondent argues that the NOA in question was mailed on April 1, 2015. Mr. Defreitas claims that the NOA was not sent out by the Canada Revenue Agency ("CRA") until May 18, 2021 when a CRA Collections officer provided him with a copy. The respondent admits that, if the NOA was first sent on the date put forth by the appellant, then Mr. Defreitas objected within time limits set out in the *Excise Tax Act*, RSC 1985, c. E-15 ("Act") and the

appeal should not be quashed. Thus, the only issue on this preliminary motion is when the NOA was sent.

II. FACTS

[3] On Dec 2, 2013 the appellant purchased a property located at 3 Matthewson Ave, Bradford Ont. Title was transferred to him on April 1, 2014.

[4] On March 28, 2014 the appellant signed the GST/HST new housing rebate application for houses purchased from a Builder. This application included his address at 3 Matthewson Ave.

[5] In February 2015, the CRA audited the appellant.

[6] On June 14, 2016 the appellant moved out of 3 Matthewson Ave.

[7] On February 25, 2020 the appellant received a legal warning letter about a GST/HST debt.

[8] On August 4, 2021, the appellant electronically filed with the Minister a Notice of Objection to the Assessment.

[9] The Minister considered the Notice of Objection filed on August 4, 2021, as an Application for an extension of time to file a Notice of Objection.

[10] On October 15, 2021, the Minister denied the appellant's application for an extension of time to file a Notice of Objection, because it was filed 2,227 days beyond the expiry of the timeframe for granting such extension pursuant to paragraph 303(7)(a) of the Act.

[11] On November 9, 2021, the appellant filed an appeal to this Court with respect to the Assessment.

[12] Some time in December 2020 the appellant hired Alexander Shaulov as his representative. Mr. Shaulov made inquiries with the CRA, including an Access to Information and Privacy (ATIP) request.

[13] Mr. Shaulov has concluded that the applicable NOA was not prepared by the CRA on April 1, 2015. This conclusion is in large part based upon his analysis of the information provided through his ATIP request.

[14] The appellant and Mr. Shaulov both testified on his behalf. Mr. Anujan Kumaranathan, a CRA employee, testified for the respondent. An affidavit of CRA employee Wade Smith was also filed by the respondent.

[15] I do not criticize the creditability of any witness who provided evidence in this matter. Each party attempted to be helpful and to provide answers to the questions asked. Yet, as will be analyzed below, the various witnesses ask me to make a finding of fact that is diametrically opposed. Specifically, the appellant's witnesses testified that the NOA was not sent until 2021, whereas the respondent's witnesses provides evidence that the NOA was mailed on April 1, 2015.

III. POSITION OF THE APPELLANT

[16] Much of the appellant's evidence came through his representative, Mr. Shaulov. The following are the reasons the appellant argues that I should find that the NOA was not sent on April 1, 2015:

(i) based upon Mr. Shaulov's review of the information provided through the ATIP request, the CRA did no more than create a draft NOA in April 2015;

(ii) the CRA did not, until 2021, have Mr. Defreitas' SIN number or address. In effect, he argues that the CRA did not have sufficient records to assess the appellant in 2015;

(iii) the appellant asks the Court to make an adverse inference based on the results of his ATIP request. This because, as a result of his ATIP request, he was only provided with a draft NOA. He relies upon section 30(2) of the *Canada Evidence Act* RSC 1985, C-5. in making this argument. This section reads as follows:

> **Inference where information not in business record**
>
> **(2)** Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.

IV. POSITION OF THE RESPONDENT

[17] The respondent submits that an assessment is deemed to have been made on the day it was sent and received by the recipient on the day it was mailed.[1]

[18] The respondent emphasizes that the appellant must do more than simply assert that he did not receive the NOA in April 2015. Credible evidence must be lead to support this position.

[19] In an analysis of the appellant's creditability, the respondent relies upon the following. First, the appellant has not filed taxes since 2003, describing the appellant as someone that "has shown a history of disregard towards his tax obligations under various taxation statues".[2] Therefore, the lack of a duly filed objection cannot be taken as an inference that the NOA was not received by the appellant. The respondent submits that it is far from certain that the appellant would have objected to the NOA if he received it in 2015.

[20] The respondent further points out that appellant has testified that he felt he was entitled to and assured of the rebate in issue. The respondent argues that it is reasonable to conclude appellant received the NOA on April 1, 2015 but took no action.

[21] Furthermore, the respondent argues that if I do find the appellant has provided evidence to create doubt as to whether the appellant received the NOA, the respondent has brought sufficient evidence to show, on the balance of probabilities, that CRA mailed the NOA on April 1, 2015. The respondent relies upon the evidence of its two witnesses in support of this assertion.

V. ANALYSIS

[22] Both sides correctly state that my analysis should rely upon *DaSilva v Her Majesty the Queen*, 2018 TCC 74.

[23] *DaSilva* reproduced the four-step test to be applied when a taxpayer alleges that a NOA issued under the Act was never mailed.

(1) Step 1

[1] See *DaSilva v. HMQ*, 2018 TCC 74 [*DaSilva*] at para 4(d), citing ss. 334(1) and 335(11) of the *Excise Tax Act*, RSC 1986, c. E-15 ("Act").
[2] Respondent's written submissions, at para 20.

[24] Under Step 1, the taxpayer must assert that the NOA was not sent by the Minister, either by asserting that (1) he or she did not receive the NOA and thus believes that it was not mailed, or (2) it was mailed to the wrong address through no fault of his or her own.[3]

[25] The Federal Court of Appeal has made it clear that if the taxpayer's assertion at Step 1 is not credible, there is no need to proceed further.[4]

[26] The appellant does not allege that the NOA was mailed to the wrong address, as he testified that he was living at the Rebate Property at the time of the Assessment. Instead, the appellant alleges that the NOA had not been mailed at all in April, 2015.

[27] In support of this assertion, the appellant has merely testified that the NOA was not received. He is an individual who had not filed tax returns since 2003. He therefore does not appear to be a person diligent in dealing with his tax filings.

[28] The appellant has almost certainly not discharged his burden to credibly assert that the NOA was not received. He has simply made an assertion that he did not receive the NOA that was alleged to have been mailed on or around April 1, 2015. I would allow the Crown's motion on this basis. Nevertheless, I will also analyze the other steps set out in *DaSilva*.

(2) Step 2

[29] Under Step 2 of the test, if the Court finds that the appellant discharged his burden to credibly assert that the NOA was not sent by the Minister, the respondent bears the burden to introduce sufficient evidence to prove that the NOA was indeed sent. The standard of proof is balance of probabilities.[5]

[30] The respondent submits that it has met its burden to prove, on the balance of probabilities, that the NOA was sent on April 1, 2015.

[31] In their written submissions at paragraph 27, the respondent has properly described their evidence as such:

> The Respondent tendered three affidavits from two CRA officers to demonstrate that the Assessment was mailed on April 1, 2015. The Affidavit of

[3] *DaSilva, supra* note 1 at para 4(a).
[4] *Mpamugo v. The Queen*, 2017 FCA 136 at para 11-12 [*Mpamugo*].
[5] *DaSilva, supra* note 1 at para 4(b).

> Anujan Kumaranathan affirmed on September 14, 2023 sets out that the Assessment was released in the CRA's Business Client Communication System ("BCCS") cycle 000006840, which ran on March 28, 2015 with a notice date of April 1, 2015.[6] The Affidavit of Wade Smith, Manager for the Print to Mail Division located in the Prince Edward Island Taxation Centre of the Canada Revenue Agency, sworn on September 12, 2023 sets out that BCCS cycle 000006840 was printed and mailed on time.[7] The Affidavit of Anujan Kumaranathan affirmed on September 7, 2023 sets out that he was unable to find that a Notice of Objection to the Assessment was received by the CRA on or before June 30, 2015, or an application to extend the time to file a Notice of Objection was received by the CRA on or before June 30, 2016. As such, the Respondent submits it has discharged its burden to prove, on the balance of probabilities, that the Assessment was sent.[8]

[32] Mr. Kumaranathan appeared in court and was cross examined.

[33] The appellant argues that the Court should not accept the respondent's evidence; on the basis that neither Mr. Kumaranathan nor Mr. Smith had "personal knowledge" of the mailing of the NOA. The appellant argues that the affidavits of Mr. Smith and Mr. Kumaranathan lack detail, and Mr. Smith at least in part relies upon information conveyed to him by others. He states the affidavits are based on a standard form and are not produced in the most accurate and diligent manner. Therefore I should place no weight on their evidence

[34] I disagree with the appellant's analysis. While my preference would be that Mr. Smith, in his affidavit, advised as to when he began to work for the CRA, yet this is not a sufficient basis to dismiss his evidence. In all other respects, I find the evidence of the respondent contains the information I am seeking to reach judgement. I therefore find that the appellant fails on this second step. I find that, on the balance of probabilities, the NOA was sent to the appellant, at 3 Matthewson Ave. on April 1, 2015.

(3) Step 3

[35] Given that I have found that the respondent has discharged his burden to prove, on the balance of probabilities, that the NOA was mailed on April 1, 2015, then the NOA is deemed to have been received by the appellant on April 1, 2015. However, Step 3 of the test provides that the appellant may nonetheless introduce

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[6] Affidavit of Anujan Kumaranathan, affirmed on September 14, 2023, at para 6
[7] Affidavit of Wade Smith sworn September 12, 2023, at para 10.
[8] Affidavit of Anujan Kumaranathan, affirmed on September 7, 2023, at para 28.

evidence to rebut this presumption and prove that the NOA was actually sent on a different date.[9]

[36] As noted, the appellant in large part relies upon notes and documents obtained in the ATIP request, to infer that the NOA was not prepared in April 2015.

[37] I do not find the evidence lead by the appellant rebuts the presumption found in step 2. The inferences I am asked to draw by the appellant, including that the NOA was backdated, are not reasonably drawn from the evidence lead.

[38] By way of example, the appellant relies upon a notation in the memo to file prepared by the CRA auditor on 2015-03-26 which states *sent file for review* as evidence that a NOA was not prepared on April 1, 2015. [10] I do not interpret this entry in the same way. This comment is so brief and lacking in context that I see no evidentiary value to it.

[39] The appellant also alleges that the Minister's lack of accurate records concerning the appellant's social insurance number and the appellant's address meant that the Minister could not have sent the NOA to the appellant in 2015. This argument is based on a faulty assumption, as it fails to consider that the appellant applied for the Rebate and set out the address of the Rebate Property in the application form. I have no doubt that the Minister had the appellant's 3 Matthewson Avenue, Bradford, Ontario address in 2015. The address is in fact included in the memo to file relied upon by the appellant.

[40] Next, the appellant emphasizes that the ATIP records included a draft NOA. Therefore, the NOA claimed to have been mailed does not exist and could not have been sent on April 1, 2015. It is my finding that the existence of a draft NOA is not demonstrative of the non-existence of a finalized NOA. The draft NOA is otherwise the same as the mailed NOA save for the watermark "Draft". On this topic, this Court prefers the evidence tendered by the two CRA officers to the negative inference that the appellant asks this Court to draw from the draft assessment in the ATIP package.

[41] Finally, the appellant asks me to make an adverse inference based on the results of the aforementioned ATIP request. This once again refers to the fact that

[9] *DaSilva, supra* note 1 at para 4(c).
[10] Appellant's document A-5 at page 072.

the response to the ATIP request only provided a draft NOA. He relies upon section 30(2) of the *Evidence Act* in making this argument.

[42] His argument relies upon an incorrect interpretation of section 30(2) of the *Canada Evidence Act*. The appellant is referencing records provided by an ATIP request in seeking an adverse inference. Even if I were to apply 30(2), the section uses the words *may make* an adverse inference. Given the evidence I have been provided in this case, I will not make the requested adverse inference.

[43] Accordingly, the appellant has not been able to put forth sufficient documentary evidence or testimony to rebut the presumption that the NOA was sent on April 1, 2015, as established in Step 2 of the test.

(4) Step 4

[44] Step 4 of the test sets out that a NOA is deemed to have been made on the date established in either step 2 or 3 and received by the recipient on the same day.[11]

[45] Based upon the above analysis, I find that the NOA was received by the appellant on the day it was mailed, April 1, 2015. A notice of objection to the assessment was not filed by the appellant pursuant to the requirements of the *Act*.

[46] As no valid objection has been filed by the appellant within the timelines set out in the Act, therefore a precondition set out in s.306 of the *Act* to appealing the assessment has not been met. The appeal is therefore quashed.

[11] *Supra*, note 1.

[47] Each party shall be responsible for their own costs.

Signed at Ottawa, Canada, this 30th day of April, 2024.

"R. MacPhee"

MacPhee J.

CITATION:	2024 TCC 52
COURT FILE NO.:	2021-2767(GST)I
STYLE OF CAUSE:	OTHNIEL DEFREITAS AND HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 19, 2023
REASONS FOR JUDGMENT BY:	The Honourable Justice Ronald MacPhee
DATE OF JUDGMENT:	April 30, 2024

APPEARANCES:

Agent for the Appellant:	Alexander Shaulov
Counsel for the Respondent:	Mike Chen

COUNSEL OF RECORD:

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