Cour d'appel fédérale

Federal Court of Appeal

Date: 20091022

Docket: A-420-08

Citation: 2009 FCA 302

CORAM: **NOËL J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

INNOVATIONS ET INTÉGRATIONS BRASSICOLES INC.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held at Montréal, Quebec, on October 20, 2009.

Judgment delivered at Ottawa, Ontario, on October 22, 2009.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: PELLETIER J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from a judgment of Justice Tardif of the Tax Court of Canada (the TCC judge), who quashed the notice of appeal filed by the appellant on the basis that it was the wrong remedy. According to the TCC judge, the applicable remedy under the circumstances was an appeal before the Federal Court of Appeal.

[2] Briefly stated, in an initial appeal, the appellant chose to assert its rights before the Tax Court of Canada by electing the informal procedure. Under this procedure, the amount that it

could be refunded could not exceed $12,000. In a second appeal filed before the Tax Court of Canada, the appellant asked that this limit be raised and that it be refunded an additional $7,000, to which it would have been entitled were it not for the procedure chosen. The TCC judge relied on the doctrine of *res judicata* to find that the only remedy available was an appeal before the Federal Court of Appeal.

[3] According to the appellant, which is represented by one of its senior executives, the TCC judge erred in law. It asks this Court to allow the appeal and order the refund of the excess amount, with interest.

FACTS

[4] On December 9, 2003, the Minister of National Revenue (the Minister) made an initial assessment in respect of the appellant for its 2001 taxation year, disallowing the refundable investment tax credit of more than $19,000 claimed for the year, on the basis that the appellant's activities did not constitute scientific research and experimental development.

[5] On June 23, 2004, the appellant filed an initial appeal against this assessment before the Tax Court of Canada (appeal number 2004-2805(IT)I). In its notice of appeal, the appellant specifically asked that the informal procedure apply in respect of its appeal.

[6] On August 31, 2004, the respondent sent the appellant the reply to the notice of appeal. The letter accompanying that pleading informed the appellant that, under the informal procedure,

the Tax Court of Canada could rule on its appeal only in an amount of tax not exceeding $12,000, unless the appellant elected to have the general procedure apply in respect of its appeal. The letter stated that the amount at issue in its appeal was approximately $19,065.

[7] The respondent indicated more formally in its reply to the notice of appeal that it had noted the appellant's election of the informal procedure in respect of its appeal, even though the total amount of tax at issue for its 2001 taxation year exceeded $12,000.

[8] The hearing into the initial appeal took place before Justice Bédard. The transcript shows that, on the first day of the hearing, counsel for the respondent raised the fact that the appellant had elected to have the informal procedure apply with respect to its appeal, even though the amount at issue for its 2001 taxation year was approximately $19,000 (opening remarks, transcript of the hearing on February 28, 2005, in the appeal 2004-2805(IT)I, page 5, line 22, and page 8, line 15, Exhibit I-1, Appeal Book, Tab 7, pages 236 to 268, at pages 240 to 243).

[9] Justice Bédard then made sure that the appellant was aware of the $12,000 limit and confirmed at the hearing that, in the event of a favourable judgment, the judgment would be limited to $12,000 (opening remarks, transcript of the hearing on February 28, 2005, in the appeal 2004-2805(IT)I, page 6, lines 12 to 14, and page 8, lines 11 to 15, Exhibit I-1, Appeal Book, Tab 7, pages 236 to 268, at pages 241 and 243).

[10] Before the end of the hearing, in a letter sent to the Tax Court of Canada dated April 1, 2005, the appellant asked that, given the $12,000 limit, the Court award it $7,000 in special costs to take into account the amount that it could not claim.

[11] By judgment dated September 25, 2005, the Tax Court of Canada allowed the appeal and referred the assessment of the appellant's 2001 taxation year back to the Minister for reconsideration and reassessment, in accordance with the reasons for judgment.

[12] The Tax Court of Canada then amended its reasons at the request of the parties to account for an agreement that had been reached, and issued an amended judgment on December 1, 2005, still allowing the appellant's appeal.

[13] On June 2, 2006, the Minister reassessed the appellant for its 2001 taxation year, allowing it a $12,000 refundable investment tax credit.

[14] On August 29, 2006, the appellant served on the Minister a notice of objection to this reassessment.

[15] On November 14, 2006, the appellant sent a letter to the Tax Court of Canada asking it to intervene in the implementation of the amended judgment of December 1, 2005, so that the appellant might obtain a refundable investment tax credit of $19,404 instead. The respondent objected to this request in a letter dated December 7, 2006.

[16] On December 20, 2006, the Tax Court of Canada declined to grant that request on the grounds that the powers of the Tax Court of Canada were spent and that it had been *functus officio* since December 1, 2005.

[17] On April 20, 2007, the Minister reassessed the appellant for its 2001 taxation year. Under this reassessment, the refundable tax credit remained at $12,000 as had been previously allowed to the appellant under the June 2, 2006, assessment.

[18] On July 18, 2007, the appellant filed a second appeal to the Canada Tax Court (number 2007-3271(IT)I), this time against the reassessment of April 20, 2007, again to contest the $12,000 limit that the Minister had applied to the calculation of the refundable tax investment on assessing.

DECISION OF THE TAX COURT OF CANADA

[19] The TCC judge began his analysis by noting that the distinction between the informal procedure and the general procedure is not trifling. This difference is reflected, among other things, in the costs that can be allowed and the applicable rules of evidence (reasons, para. 7).

[20] The TCC judge stated that the parties are generally informed about the differences between the two schemes when the amount is close to the $12,000 threshold. In the case at bar, the issue was brought to the appellant's attention several times: further to the appellant's notice

of appeal, upon the filing of the reply to the notice of appeal and at the hearing before Justice Bédard (reasons, para. 9).

[21] The TCC judge then addressed the appellant's argument that it had not obtained all the information needed to make an informed choice. The judge stated first that ignorance is not an excuse (reasons, paras. 10 and 11). Moreover, the appellant's agent, by his silence, accepted the consequences of the informal procedure (*ibidem*).

[22] According to the TCC judge, the appellant could have appealed Justice Bédard's judgment but did not do so (reasons, paras. 16 and 17). In the TCC judge's view, that was the only possible remedy. In the absence of such remedy, Justice Bédard's decision was *res judicata* (reasons, paras. 21, 26, 27 and 28).

[23] The TCC judge concluded his analysis as follows (reasons, para. 30):

> The Appellant cannot, today, indirectly do what it should have done within the time allotted by the Act. Consequently, the Notice of Appeal is quashed.

ALLEGED ERRORS

[24] In support of the appeal, the appellant's agent contends that he could appeal to the Tax Court of Canada under subsection 164(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act). This provision allows a taxpayer to ensure that an assessment issued following a judgment of the Court is in accordance with that judgment.

[25] As for the merits of the case, he reiterates the argument that he had not been adequately informed of his rights. He also criticizes Justice Bédard for failing to amend the pleading of his own motion to allow the appellant to recover the full amount.

ANALYSIS AND DECISION

[26] As demonstrated below, the appellant could not be granted an investment tax credit exceeding $12,000 under the informal procedure. The only issue is therefore whether the appellant consented to the application of the informal procedure in respect of its appeal before Justice Bédard. If so, it cannot claim to be entitled to an amount exceeding $12,000.

[27] Indeed, under section 18.1 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2 (the TCCA), every judgment that allows an appeal to which the informal procedure applies shall be deemed to include a statement that the "aggregate of all amounts" in issue not be reduced by more than $12,000 or that the amount of the loss in issue not be increased by more than $24,000, as the case may be. There is no limit to the amount that the Tax Court of Canada may determine in an appeal heard under the general procedure.

[28] Moreover, section 2.1 of the TCCA provides that the "aggregate of all amounts" means the total of all amounts assessed or determined by the Minister under the Act, but does not include any amount of interest or any amount of loss determined by the Minister.

[29] The refundable investment tax credit, set out at section 127.1 of the Act, is an amount determined by the Minister under paragraph 152(1)(*b*) of the Act. Under subsection 152(1.2) of the Act, the provisions relating to an opposition to and appeal from an assessment apply to the determination, with such modifications as the circumstances require.

[30] The refundable investment tax credit of over $19,000 in issue therefore fell within the definition of “aggregate of all amounts”, at section 2.1 of the TCCA, as an amount determined by the Minister under the Act. Consequently, it was an amount referred to by section 18.1 of the TCCA.

[31] This section is a deeming provision: every judgment that allows an appeal to which the informal procedure applies shall be deemed to include a statement that the “aggregate of all amounts” in issue not be reduced by more than $12,000, whether or not it is expressly mentioned in the judgment.

[32] The record discloses that the judgment amended by Justice Bédard on December 1, 2005, was implemented by way of determination on June 2, 2006, in accordance with subsection 164(4.1) of the Act. Under subsection 165(1.1) of the Act, the appellant could object to the determination implementing the amended judgment and could, under subsection 169(2) of the Act, appeal the determination to the Tax Court of Canada. However, this right is limited to ensuring that the deduction was in accordance with the judgment made, which was subject to the $12,000 limit imposed by the Act.

[33] After objecting to the determination of June 2, 2006, the appellant did not exercise its right of appeal. Instead, the appellant sent a letter to the Tax Court of Canada asking it to intervene in the implementation of the amended judgment dated December 1, 2005, so that the appellant might obtain a $19,404 tax credit.

[34] In a letter dated December 20, 2006, signed by a registry officer, the appellant received the following reply:

> [TRANSLATION]
> . . . The Court rendered its judgment on December 1, 2005. The powers of the Court are spent, and the Court has been *functus officio* in respect of this appeal since December 1, [2]005.

[35] Following this refusal, another assessment was issued, identical to the previous one, limiting the refund allowed to $12,000. I have been unable to identify the provision according to which this last assessment was issued, and counsel for the respondent was also unable to shed light on this point. However, assuming it to be valid, which is the only hypothesis that would allow the Court to hear this appeal, the issue facing the appellant remains the same, since the determination is still the outcome of the judgment that allowed the appellant's appeal under the informal procedure.

[36] The appellant therefore cannot succeed unless it demonstrates that its appeal before Justice Bédard was not subject to the informal procedure. In this regard, the appellant claims that it did not agree to the informal procedure (appellant's memorandum, pp. 15, 16 and 17) and that,

in any event, Justice Bédard had a duty under section 18.13 of the TCCA to order that the general procedure apply to its appeal (*idem*, p. 19).

[37] Regarding the first argument, as discussed above, the evidence clearly shows that the appellant was informed on many occasions that the informal procedure that it relied on reduced the amount that it could be paid, if it were to succeed. The appellant cannot now argue that it had acted without knowledge. In particular, the appellant was well aware of the fact that the $12,000 limit applied to the tax credits it was claiming, as evidenced by its letter dated April 1, 2005. In this letter, while its appeal before Justice Bédard was still pending, the appellant asked that the credits subject to this limit be remitted to it as costs.

[38] As for the second argument, it is true that section 18.13 of the TCCA required that Justice Bédard, on motion of one of the parties, order that the general procedure apply with respect to the appeal. However, no such motion was made.

[39] Under that same section, Justice Bédard also had the power to convert the procedure on his own motion. In this regard, after noting that the appellant was perfectly aware of the consequences of its choice, Justice Bédard was required to respect that choice.

[40] I would dismiss the appeal with costs.

"Marc Noël"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Johanne Trudel J.A."

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-420-08

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE TARDIF OF THE TAX COURT OF CANADA, DATED JULY 3, 2008, DOCKET NO. 2007-3271(IT)I).)

STYLE OF CAUSE:	Innovations et intégrations Brassicoles Inc. and Her Majesty the Queen
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 20, 2009
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CONCURRED IN BY:	PELLETIER J.A. TRUDEL J.A.
DATED:	October 22, 2009

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