

Docket: 2002-2912(GST)I

BETWEEN:

BERNARD DESROSIERS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Motions heard on June 25, 2003, at Rivière-du-Loup, Quebec

Before: The Honourable Judge François Angers

Appearances:

Agent for the Appellant: Bernard Brosseau

Counsel for the Respondent: Frank Archambault

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ORDER

Upon motion by the Respondent for dismissal of the appeal on the ground that it was filed outside the time prescribed by the *Excise Tax Act* (the "Act");

Whereas there is no evidence that the reassessment was sent to the Appellant pursuant to the requirements set out in subsection 301(5) of the Act;

The Respondent's motion is dismissed.

Upon preliminary motion by the Appellant to vacate the assessment on the ground that the Minister did not act with all due dispatch pursuant to subsection 301(3) of the Act;

In view of the attached reasons;

The Appellant's motion is dismissed.

The appeal from the assessment dated March 13, 1998 shall be heard at a future sitting of this Court, at a date that shall be communicated to the parties.

Signed at Edmundston, Canada, this 23<sup>rd</sup> day of December 2003.

"Angers, J."

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Angers, J.

Translation certified true  
on this 26<sup>th</sup> day of April 2004.

Sharlene Cooper, Translator

Citation: 2003TCC859  
Date: 20031223  
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### **REASONS FOR ORDER**

#### **François Angers, J.**

[1] This is an appeal from an assessment dated March 13, 1998, in relation to goods and services tax, made under the *Excise Tax Act* (the "Act") for the period from February 1, 1995 to November 30, 1997. Both parties filed a motion with the Court at the start of the hearing, and in view of the nature of these motions, it was appropriate to rule on them before hearing the evidence on the merits.

[2] To get a clear picture of the context, I will outline the facts that were proved in support of both motions and I will clarify their nature.

[3] The assessment under appeal is dated March 13, 1998. It was sent to the Appellant's home address, where he has resided since 1983. On June 11, 1998, Revenue Canada – Customs, Excise and Taxation received an undated Notice of Objection to the said assessment, which was filed by the Appellant pursuant to the provisions of subsection 301(1.1) of the Act.

[4] Having received no confirmation or reassessment from the Minister, or notice that the assessment had been vacated, the Appellant cited paragraph 306(b)

of the Act, and he filed an appeal with our Court on May 16, 2002. Paragraph 306(b) reads as follows:

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

- (a) ...
- (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.

[5] By a preliminary motion, the Appellant moved to have the assessment vacated on the ground that the Minister did not act with all due dispatch upon receiving the Notice of Objection to reconsider the assessment and to vacate, confirm or reassess it pursuant to subsection 301(3).

[6] In reply to this motion, the Respondent adduced in evidence a reassessment dated January 28, 2000, for the same period, which was made pursuant to subsection 301(5) of the Act and which vacated the assessment dated March 13, 1998. A photocopy of the Minister's record, showing that the reassessment was mailed on January 14, 2000, is appended to the reassessment;

[7] Thus, Counsel for the Respondent maintains that the Minister did indeed consider the Notice of Objection and that a reassessment was made as a result.

[8] This situation led Counsel for the Respondent to ask the Court to dismiss the appeal on the ground that it was filed outside the time prescribed by the Act, as the reassessment is dated January 28, 2000, and the Notice of Appeal was filed on May 16, 2002.

[9] In reply, the Appellant testified that he never received the reassessment and that this was the first time he had heard of it. Furthermore, the Respondent's Reply to the Notice of Appeal does not mention the existence of a reassessment.

[10] Subsection 301(5) of the Act states that after reconsidering or confirming an assessment, the Minister shall send to the person objecting notice of the Minister's decision by registered or certified mail. Therefore, the Minister need only send the reassessment by registered or certified mail to meet the service requirements set

out in the Act. In cases where service becomes a point at issue, proof of service by mail is provided pursuant to the provisions of subsection 335(1) of the Act, which reads as follows:

**Proof of service by mail** – Where, under this Part or a regulation made under this Part, provision is made for sending by mail a request for information, a notice or a demand, an affidavit of an officer of the Agency, sworn before a commissioner or other person authorized to take affidavits, setting out that the officer has knowledge of the facts in the particular case, that such a request, notice or demand was sent by registered or certified mail on a named day to the person to whom it was addressed (indicating the address), and that the officer identifies as exhibits attached to the affidavit the post office certificate of registration of the letter or a true copy of the relevant portion thereof and a true copy of the request, notice or demand, is evidence of the sending and of the request, notice or demand.

[11] In this case, there is no evidence that the reassessment was sent to the Appellant pursuant to the requirements of subsection 301(5) of the Act. The document attached to the reassessment indicates that it was sent, but does not specify the method by which it was sent. Since I am not satisfied that the reassessment was in fact sent pursuant to the requirements of the Act, I must find that the Minister never sent the Appellant the result of his consideration of the Appellant's Notice of Objection. Therefore, this appeal was filed within the prescribed time.

[12] It is important to remember that the Act does not require that the assessment be received; rather, according to the Act, simply sending the assessment is sufficient. In this regard, I need only refer to the decision of the Federal Court of Appeal in *Schafer v. R.*, [2000] F.C.J. No. 1480 (Q.L.); [2000] G.S.T.C. 82. Therefore, the Respondent's motion is dismissed.

[13] With regard to the Appellant's motion faulting the Minister for not acting with all due dispatch upon receiving the Notice of Objection, the Agent for the Appellant is basing this motion on the decision rendered on February 3, 1989, by Bonner J. of this Court, in *J. Stollar Construction Ltd. v. The Minister of National Revenue*, 89 DTC 134. In this case, Bonner J. invalidated an assessment that was made by the Minister under the *Income Tax Act* more than five years after the taxpayer corporation had sent its tax return.

[14] Since *Stollar*, there have been other decisions dealing with the same issue, including *Ginsberg v. Canada*, [1996] 3 F.C. 334, in which the Federal Court

of Appeal found that a breach of the duty to assess tax with "all due dispatch" does not mean that the assessment will be vacated. The same reasoning applies in this case, even though the provisions of the Act are at issue here. In this case, the Minister had already made an assessment; it is only the Minister's consideration of the objection that must be made with all due dispatch.

[15] Another distinction in this case is that the Appellant has the right to appeal to this Court if 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. Thus, the Appellant is permitted to advance his case and be heard on the merits without waiting until the Minister has considered the Appellant's Notice of Objection. Finally, application of the provisions set out in section 299 of the Act will preclude the assessment under appeal in this case from being vacated.

[16] For these reasons, the Appellant's motion is dismissed. Thus, the appeal from the assessment dated March 13, 1998, shall be heard at a future sitting of this Court, at a date that shall be communicated to the parties.

Signed at Edmundston, Canada, this 23<sup>rd</sup> day of December 2003.

"Angers J."

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Angers, J.

Translation certified true  
on this 26<sup>th</sup> day of April 2004.

Sharlene Cooper, Translator