

Docket: 2022-3160(IT)G

BETWEEN:

SODECIA CANADA INVESTMENTS INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion made by the Respondent to quash the notice of appeal pursuant to paragraph 53(1)(d) of the *Tax Court of Canada Rules* (General Procedure) heard in Toronto, Ontario on January 8, 2024.

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant: John Sorensen

Counsel for the Respondent: Brent E. Cuddy

ORDER

In accordance with the attached Reasons for Order, the appeal from the assessment made under the *Income Tax Act* for the Appellant's 2013 taxation year, is hereby quashed, with costs to the Respondent.

Signed at Ottawa, Ontario, this 27th day of March 2024.

“Guy Smith”

Smith J.

Citation:2024 TCC 40
Date:20240327
Docket: 2022-3160(IT)G

BETWEEN:

SODECIA CANADA INVESTMENTS INC.,

Appellant,

and

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Respondent.

REASONS FOR ORDER

Smith J.

I. Overview

[1] This matter involves a motion made by the Respondent to quash the appeal from an assessment made by the Minister of National Revenue (the “Minister”) under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the “Act”).

[2] The notice of assessment is dated June 8, 2017 and relates to the Appellant’s 2013 taxation year (the “Assessment”). The Respondent argues that the Appellant has not fulfilled an essential precondition for instituting an appeal as it failed to serve a notice of objection within the time-limits set out in the Act.

[3] The Respondent therefore argues the appeal “discloses no reasonable grounds for appeal” and should be quashed, relying on paragraph 53(1)(d) of the *Tax Court of Canada Rules* (General Procedure).

[4] The Appellant takes the position that although the Assessment is dated June 8, 2017, the Canada Revenue Agency (“CRA”) failed to mail it at that time and a copy was only mailed, at the request of its authorized agent, on June 6, 2022.

[5] The Appellant therefore argues that the correct date of mailing of the assessment is June 6, 2022 and that it promptly served a notice of objection. As a result, the appeal is properly before this Court and should be heard on its merits.

[6] For reasons that follow, the Court concludes the appeal should be quashed because the Appellant received or is deemed to have received the Assessment on June 8, 2017. The appeal is therefore out of time.

II. The Issues

[7] The issue at the heart of this motion is whether the Appellant received or is deemed to have received the Assessment on June 8, 2017. If the Court concludes in the affirmative, the motion must be allowed and the appeal quashed.

[8] Alternatively, if the Court concludes that the Assessment was mailed to the Appellant on June 6, 2022 and that a notice of objection was served on June 27, 2022, the motion must be dismissed.

III. The Relevant Statutory Provisions

[9] The following statutory provisions are relevant to this appeal:

152(8) Assessment deemed valid and binding - An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.

[10] Subsections 244(10), (14) and (15) are set out in Part XV of the Act entitled *Administration and Enforcement* and subtitled *Procedure and Evidence* :

244(10) Proof of no appeal - An affidavit of an officer of the Canada Revenue Agency, sworn before a commissioner or other person authorized to take affidavits, setting out that the officer has charge of the appropriate records and has knowledge of the practice of the Agency and that an examination of those records shows that a notice of assessment for a particular taxation year or a notice of determination was mailed or otherwise communicated to a taxpayer on a particular day under this Act and that, after careful examination and search of those records, the officer has

been unable to find that a notice of objection or of appeal from the assessment or determination or a request under subsection 245(6), as the case may be, was received within the time allowed, shall, in the absence of proof to the contrary, be received as evidence of the statements contained in it.

(...)

244(14) Mailing or sending notice - For the purposes of this Act, where any notice or notification described in subsection 149.1(6.3), 152(3.1), 165(3) or 166.1(5) or any notice of assessment or determination is mailed, or sent electronically, it shall be presumed to be mailed or sent, as the case may be, on the date of that notice or notification.

(...)

244(15) Date when assessment made - If any notice of assessment or determination has been sent by the Minister as required by this Act, the assessment or determination is deemed to have been made on the day of sending of the notice of the assessment or determination.

(...)

[11] Section 248 is set out in Part XVII of the Act entitled *Interpretation* and contains a number of definitions including the following:

248(7) Receipt of things mailed - For the purposes of this Act,

(a) anything (other than a remittance or payment described in paragraph 248(7)(b)) sent by first class mail or its equivalent shall be deemed to have been received by the person to whom it was sent on the day it was mailed; and (...)

IV. The Relevant Facts.

[12] By way of background, the Appellant was a non-resident of Canada with an office in London, Ontario. On April 17, 2013, it redeemed 30% of its shares held by a Delaware corporation and withheld tax at the rate of 5%.

[13] On June 8, 2017, the Minister assessed the Appellant for a total of \$609,193 (including penalties and interest) on the basis that the appropriate withholding rate was 15%. Further details are set out in the notice of appeal filed herein.

(1) Evidence of the Respondent

[14] In support of its motion to quash the appeal, the Respondent submitted three affidavits prepared in accordance with subsection 244(10) of the Act. All of the affiants were called as witnesses at the hearing.

A - Michele Nguyen

[15] Ms. Nguyen was an officer in the Toronto Litigation Office of the CRA. She claimed to have appropriate knowledge of the records and practise of CRA and had examined the specific records pertaining to the Appellant.

[16] She referred to a database used to store all electronic correspondence sent to taxpayers in a system referred to as “Enterprise Correspondence Outputs / Enterprise Correspondence History” or “ECH”. It indicated that the Minister had assessed the Appellant, then known as Sodecia Canada Inc., for the 2013 taxation year by notice of assessment dated June 8, 2017.

[17] A reproduction of the Assessment, titled “Non-resident tax notice of assessment”, was appended to her affidavit. The mailing address was 300 Sovereign Road, London, Ontario.

[18] She explained that it was CRA’s practise to store taxpayer information including address history in an electronic mainframe and that her search of those records confirmed that the Appellant’s mailing address commencing in December 19, 2011, was 300 Sovereign Road, London, Ontario but that it was changed to 425 Sovereign Road, London, Ontario effective June 9, 2020.

[19] The CRA records indicated that the Appellant had not filed a notice of objection to the Assessment but that it purported to do so on June 27, 2022. By letter dated August 31, 2022, CRA advised that the purported notice of objection could not be accepted as it had not been filed within 90 days from the date of the Assessment.

B - Grant Hutter

[20] As set out in his affidavit, Mr. Hutter described himself as a “Programs Officer in the Non-Resident Source Deductions (NRSD) System Support Section, Debt Management Systems Division, Technology and Business Systems Division, Technology and Business Intelligence Directorate of the Collections and Verifications Branch” of the CRA. By virtue of his duties, he had personal knowledge of the manner in which CRA maintained a daily Enterprise Automated Outputs (EAO) NRSD summary report of a notice of assessment.

[21] He provided a detailed explanation of the various steps involved in the preparation and printing of the EAO NRSD Summary resulting in the creation of a report with cycle run dates and cycle number that corresponded to the issue date of the notice of assessment.

[22] In particular, Mr. Hutter explained that the EAO NRSD Summary report was stored electronically in an excel file for future reference and that he had consulted such a report to confirm that the run date was processed on June 6, 2017, being two business days prior to the actual date of the assessment.

[23] As a result of his enquiries, he was able to determine that the Assessment was released from the EAO NRSD summary as batch cycle 1927 which ran on June 6, 2017, with a notice date of June 8, 2017. He attached a computer printout report highlighting the cycle number and indication that there were no errors in the cycle.

[24] Mr. Hutter also consulted what he referred to as the “Summerside Daily Report” for the 2013 taxation year printed as part of a file provided to Summerside for cycle 1927. He explained that the job quantity and total job quantities were reconciled against the EAO NRSD Summary for continuity purposes.

C - Joanne Myers

[25] Ms. Myers explained that she was acting manager of the “Print to Mail Division” at the Taxation Centre located in Summerside, PEI, that she had charge of the records mailed from the Print to Mail Divisions and knowledge of the agency’s practises. She had also examined the electronic print records of the Appellant in connection with the assessment for the 2013 taxation year.

[26] She explained the CRA followed a set of procedures for communicating with taxpayers in writing and that one of these procedures included the use of two “Print to Mail” sites located in Summerside, PEI and Sudbury, Ontario.

[27] Ms. Myers explained that all information to be set out in a notice of assessment was formatted electronically via an automated process and the data was released electronically to the Print to Mail Section for printing. She indicated that a notice of assessment was mailed to a taxpayer no later than three business days from the time the Print to Mail Site received the print file.

[28] The Print to Mail site was responsible for printing notices of assessment, inserting them into envelopes and having them ready for pick-up by Canada Post. Smaller jobs of fewer than 100 notices were inserted manually into envelopes while larger jobs used a high-speed inserter that mechanically folded the notices and inserted them into envelopes.

[29] She explained that “control reports” were prepared with a “job ticket” to monitor and balance documents to be printed and to serve as a check and balance to minimize processing. As well, CRA maintained an “Electronic Daily Mailing Report” showing the daily mailing jobs received, printed and mailed.

[30] Ms. Myers indicated that she had reviewed the “Electronic Daily Mailing Report” and relevant “Electronic Canada Post Statement” of mailing and had concluded that the proper procedures were followed for EAO cycle 1927.

[31] She concluded by indicating the print file containing the Appellant’s notice of assessment dated June 8, 2017, was received at the Print to Mail site on June 7, 2017, and released to Canada Post for mailing on June 8, 2017.

(2) Evidence of the Appellant

[32] As part of its responding materials to the motion, the Appellant submitted two affidavits. Both affiants testified as well as a former employee.

A - Shirley Quick

[33] Ms. Quick worked as a human resources assistant for a related company known as Sodecia Automotive London Inc. (“Sodecia”).

[34] The Appellant and Sodecia shared a leased office space in an industrial building located at 300 Sovereign Road, London, Ontario until August 2017.

[35] In July 2017, the offices and management offices were moved on a temporary basis to 2530 Innovation Drive until October 2017 and then to 425 Sovereign Drive, London, Ontario, on a permanent basis.

[36] Ms. Quick indicated that she helped with the packing and sorting of files from 300 Sovereign Drive to 2530 Innovation Drive and then to 425 Sovereign Drive. To the best of her recollection, no financial or tax-related information was purged from the files as they were moved. All such documents were stored in banker’s boxes or moved in locked filing cabinets.

[37] She also handled all incoming mail at 300 Sovereign Road. The mail carrier would enter the lobby through the front door of the building and knock on a window looking into the office. If she was present, the mail would be given to her. If no one answered, the mail would be left on the sill in the lobby just outside the office.

[38] It was her practise to remit any incoming CRA correspondence to Wilma Luesink, Sodecia’s controller. Ms. Luesink ceased working for Sodecia on October 6, 2017 and did not move to the permanent location at 425 Sovereign Drive.

[39] Ms. Quick explained that there was a double filing cabinet with four drawers, part of which was used by Ms. Leusink. The top drawer was used to keep corporate records and the second drawer for tax records.

[40] Ms. Quick indicated that in 2023 she searched this filing cabinet by removing all files. She was able to locate a file with tax documents that she provided to Jose Antunes, the accounting and tax manager for Sodecia and the Appellant.

[41] She concluded that she had no recollection of a tax assessment addressed to the Appellant in June 2017 and was unable to find one when she completed her search of Sodecia’s files in 2023.

B - Wilma Luesink

[42] Ms. Luesink worked for Sodecia from 1999 to October 2017. During the relevant period, she worked as “senior accountant” and was responsible for all financial matters including payment of invoices, month-end reporting, financial statements as well as health and dental benefits and payroll for over 100 employees. She had no formal training and had initially worked in “accounts payable.”

[43] All incoming mail involving GST/HST or taxes was given to her. CRA correspondence would be opened and put away in the filing cabinet or sent to the finance manager or a scanned copy would be sent to the US office. She would not deal directly with tax matters.

[44] The management offices were located off the main lobby and the production facilities were located at the rear of the building. She confirmed Ms. Quick’s testimony as to how mail was delivered by the mail carrier, adding that there was no receptionist during the relevant period. In particular, she confirmed that mail could be left on the sill located in the lobby, just outside the office.

[45] She also corroborated the testimony of Ms. Quick, indicating that she had the use of a filing cabinet located outside her office in a space with the workstations and cubicles for other employees. She had use of the two top drawers of that filing cabinet and CRA mail was filed in the second drawer.

[46] Ms. Luesink was aware of the dispute involving an assessment relating to the Appellant’s 2013 taxation year but she could not specifically recall seeing the Assessment. She could only provide her recollection as to how they dealt with any incoming mail including CRA correspondence.

[47] She confirmed that her team was relocated to 2530 Innovation Drive in August 2017 and the filing cabinet with the various records, including any CRA correspondence, was moved to this temporary location and placed by her desk.

[48] She had no knowledge of how records were dealt with after her departure.

C - Jose Antunes

[49] Mr. Antunes assumed the role of accounting and tax manager of Sodecia and the Appellant in May 2020 but his office was located in the State of Michigan, USA. He confirmed that the Appellant was unable to locate the Assessment and that CRA had mailed it to them in June 2022.

[50] Although he was aware of the various office moves, he had no personal knowledge of the practice for handling mail at 300 Sovereign Road.

[51] He expressed the view that the Assessment was material and that either Ms. Quick or Ms. Luesink, the controller at the time, would have recognized its significance had it been mailed to 300 Sovereign Road in June 2017.

[52] Mr. Antunes noted that the Assessment was addressed to the Appellant at 300 Sovereign Road but that the CRA letter refusing to accept the purported notice of objection of June 2022 was addressed to 425 Sovereign.

[53] His affidavit included Articles of Amendment dated April 17, 2017 whereby “Sodecia Canada Inc.” changed its name to “Sodecia Canada Investments Inc.”

V. Analysis and Discussion

[54] As noted in *Canada (National Revenue) v. ConocoPhillips Canada Resource Corp.*, 2014 FCA 297 (“*ConocoPhillips*”), the outcome of this motion is of singular importance to the Appellant because an assessment is deemed to be valid and binding unless varied or vacated on appeal, as set out in subsection 158(2).

[55] Service of a valid notice of objection “is a condition precedent to the institution of an appeal.” If there is no evidence of a valid notice of objection, the appeal should be quashed as the Court has no jurisdiction “to further extend the time for equitable reasons”: *Bormann v. Canada*, 2006 FCA 83 (paras. 3-6).

[56] Where a taxpayer alleges that a notice of assessment was not received, the Court must consider the “full evidentiary record with regard to the statutory presumption found in subsection 244(14) of the Act (which presumes a notice of reassessment to have been mailed on its date)” (*ConocoPhillips*, para. 8).

[57] In this instance, both parties agree that an appropriate analytical framework, involving a four-step test, was described by Justice Graham in *Mpamugo v. HMTQ*, 2016 TCC 215 (“*Mpamugo*”) (para. 6) (aff’d 2017 FCA 136).

[58] The first step involves an assertion by the taxpayer that the notice of assessment was not mailed at all or was not mailed to the correct address.

[59] The second step requires that the Minister prove, on a balance of probabilities, that the notice of assessment was mailed. If the Minister is able to do so, the mailing is presumed to have occurred on the date set out in the assessment.

[60] Use of the word “presumed” in subsection 244(14), gives rise to a rebuttable presumption. As part of the third step, the taxpayer may introduce evidence to prove that the assessment was actually mailed on a different date or to the wrong address. Justice Graham went on to explain the fourth step as follows:

Step 4: Once the mailing date is established (either through the presumption or through proof of a different date), the assessment is deemed to have been made on that date (subsection 244(15)) and the Notice of Assessment is deemed to have been received on that date (subsection 248(7)). These deeming provisions are not rebuttable. (...)

[61] In order to prove mailing, the Minister may rely on an affidavit prepared pursuant to subsection 244(10) where a CRA officer attests to being in charge of the appropriate records and having knowledge of the practises of CRA and indicates that he or she has examined the records for a particular taxpayer and that those records show that a notice of assessment has been sent. Absent any proof to the contrary, such an affidavit may suffice to prove mailing: (*Mpamugo*, para. 12).

[62] If the Minister is unable to rely on such an affidavit, it needs to adduce evidence “to show that it is more likely than not that the Notice was mailed” and “so long as the Crown can introduce some evidence that the mailing occurred, with no credible evidence to counter the Crown’s evidence, the conclusion should be that the Crown has proven mailing” (*Mpamugo*, para. 13).

[63] In *Barrington Lane Developments Limited v. The Queen*, 2010 TCC 388, the taxpayer had argued that the evidence of mailing was insufficient. Justice Pizzitelli reviewed the evidence of two CRA employees who outlined the mailing process

including the electronic downloading of the information for the assessment, the transfer of that information to a printing and mailing site in Canada with a log containing the date of shipping, a tracking number, the name of the taxpayer and a cycle number referencing the batch of notices sent on that day.

[64] In the end, Justice Pizzitelli was satisfied with the evidence, concluding that “the detailed and documented processes dealing with the electronic downloading, printing and mailing of the notices of assessment/reassessment constitute, on a balance of probabilities, *prima facie* proof that they are mailed” (para. 11.)

[65] In this instance, the Crown submitted the affidavit of Ms. Nguyen made pursuant to subsection 244(10). She also testified and confirmed that she had accessed the CRA records containing all correspondence to or from the Appellant including the Assessment. From her analysis of those records, she was able to confirm that the Assessment was mailed on June 8, 2017 and that a timely notice of objection had not been filed.

[66] The computer printouts appended to Ms. Nguyen’s affidavit, indicate that outgoing CRA mail addressed to the Appellant at 300 Sovereign Road was being returned. The address was updated to 425 Sovereign Road effective June 9, 2020 but this appears to have been done internally by cross checking records. There was no suggestion the Appellant had provided a notice of change of address prior to that time, despite the evidence it moved to 425 Sovereign Road in October 2017.

[67] This change of address would have explained why the Assessment was sent to the Appellant at the 300 Sovereign Road but the “refusal” letter, described in the affidavit of Mr. Antunes, was addressed to 425 Sovereign Road.

[68] Moreover, the Court notes that the Assessment was addressed to “Sodecia Canada Inc.” but the cover letter containing the purported notice of objection of June 27, 2022, informed CRA that the Appellant’s had changed its name to “Sodecia Canada Investments Inc.” effective April 7, 2017. This matter was not addressed and no explanation was provided to explain a gap of over five years.

[69] Mr. Hutter provided a detailed explanation of the preparation of non-resident notices of assessment, the process for downloading that information to an excel file to be sent to a mailing centre with the cycle run date and cycle number that corresponded to the issue date of the Assessment. He was also able to cross-check that information with the records from the mailing centre.

[70] Similarly, Ms. Myers provided a detailed explanation of the receipt of the information that was released electronically to the Print to Mail section in Summerside, PEI where she worked. She also cross-checked that information with the daily mailing report and electronic Canada Post statement.

[71] There is no need to repeat their testimony in further detail and I do not propose to do so. The Court finds the evidence of the Respondent's witnesses was both credible and convincing and unshaken by cross-examination.

[72] As a result, the Court concludes that it is more likely than not that the Assessment was sent and that the Minister has established, on a balance of probabilities, that it was mailed to the Appellant on June 8, 2017.

[73] I now turn to the evidence adduced by the Appellant.

[74] The Court agrees with the Respondent that there are gaps in the Appellant's evidence. The first concern is that mail delivered to 300 Sovereign Road could be left unattended in the lobby that was accessible to anyone who entered the building.

[75] Secondly, Ms. Quick indicated she had no recollection of the Assessment but this is not surprising since all CRA correspondence was given to Ms. Luesink. There was no suggestion that Ms. Quick would actually open the envelopes.

[76] Similar concerns arise with Ms. Leusink's evidence. If the CRA correspondence contained an assessment, this was not an "action item" or another invoice to be paid as part of her daily routine. Since she was not directly involved in taxes, she was only expected to do determine to whom it should be given. Her evidence was that she would provide the envelope to the finance manager or send a scanned copy to the US office. It was not clear how that decision was made but the Court may reasonably infer that the finance manager, as Ms. Luesink's superior, would have decided what was to be done.

[77] None of the witnesses provided any information about the finance manager or where that person's office was located. The Court may reasonably infer that it was located in the same building as part of the "management offices". If so, the envelope containing the Assessment would likely have been remitted directly to that person and there was no need for Ms. Luesink to include a copy in her tax file.

[78] The fact that Ms. Quick had searched the filing cabinet in 2023 and determined that the Assessment was not in the tax file does not seem surprising because it did not have any direct bearing on Ms. Leusink's duties.

[79] To provide further context, Ms. Quick and Ms. Luesink worked for the operating company known as Sodecia Automotive London Inc. and not directly or only indirectly for the Appellant. Even if they had received the Assessment in June 2017, the Court may reasonably infer that it was not of much concern to them because it was addressed to the Appellant and not their direct employer.

[80] Moreover, both Sodecia and the Appellant were in the midst of a relocation from 300 Sovereign Road to a temporary location in July 2017. This raises the possibility that the envelope containing the Assessment was simply put aside to be dealt with at a point in time and possibly misplaced or forgotten.

[81] In the end, the evidence is inconclusive. The Court finds that the Appellant has not rebutted the presumption that the Assessment was mailed on June 8, 2017.

VI. Conclusion

[82] Since the Court has concluded that the Assessment "has been sent by the Minister", a proper reading of subsection 244(15) is that "the assessment (...) is deemed to have been made on the day of sending the notice of assessment", being June 8, 2017. A similar conclusion arises from subsection 248(7).

[83] For all the foregoing reasons, the Court orders and adjudges that the appeal be quashed with costs to the Respondent.

Signed at Ottawa, Ontario, this 27th day of March 2024.

"Guy Smith"

Smith J.

CITATION: 2024 TCC 40
COURT FILE NO.: 2022-3160(IT)G
STYLE OF CAUSE: SODECIA CANADA INVESTMENTS
INC. v. HIS MAJESTY THE KING
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: January 08, 2024
REASONS FOR ORDER BY: The Honourable Justice Guy R. Smith
DATE OF ORDER: March 27, 2024

APPEARANCES:

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