Federal Court of Appeal | Cour d'appel fédérale

Date: 20230605

Docket: A-77-22

Citation: 2023 FCA 127

CORAM: **STRATAS J.A.**
LEBLANC J.A.
GOYETTE J.A.

BETWEEN:

IRIS TECHNOLOGIES INC.

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on June 5, 2023.
Judgment delivered from the Bench at Toronto, Ontario, on June 5, 2023.

REASONS FOR JUDGMENT OF THE COURT BY: GOYETTE J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on June 5, 2023).

GOYETTE J.A.

[1] This is an appeal from the Tax Court of Canada's decision rendered orally on March 29, 2022: File No. 2021-226 (GST) G. The Tax Court dismissed Iris Technologies Inc.'s (Iris) motion for judgment under Rule 170.1 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (Rule 170.1).

[2] The context of the motion can be summarized as follows.

[3] In March 2020, Iris applied to the Federal Court for an order directing the Minister of National Revenue (the Minister) to assess and pay Iris net tax refunds pursuant to the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act). Before the Federal Court, the Attorney General of Canada filed affidavits of an employee of the Canada Revenue Agency (the affiant). Iris then cross-examined the affiant. The day following the first cross-examination, the Minister issued notices of assessment whereby she, *inter alia*, disallowed input tax credits claimed by Iris, and consequently, refused to pay the net tax refunds that Iris was seeking.

[4] Iris appealed the assessments to the Tax Court and moved for judgment to allow its appeal under Rule 170.1. Paragraph (a) of Rule 170.1 provides that a party may apply for judgment "upon any admission in the pleadings or other documents filed in the Court, or in the examination of another party […] without waiting for the determination of any other question between the parties."

[5] The basis of Iris' motion, and of the appeal before this Court, is that during cross-examination at the Federal Court, the affiant testified that the Minister had not completed the audit when she issued the notices of assessment, thereby admitting that the Minister made no findings of fact to support her assessments. Iris argues that without a factual foundation, the assessments were "made contrary to law": Appellant's memorandum of fact and law, at para. 14.

[6] The Tax Court reviewed the evidence and concluded that there was no clear admission, if any, which would eliminate controversy between the parties for the purposes of Rule 170.1. In this regard, the Tax Court noted that the cross-examination of the affiant should not be considered an examination of another party under paragraph (a) of Rule 170.1 since the affiant was not testifying on behalf of the Minister in the course of the appeal before the Tax Court. With respect to the argument that the assessments lacked a factual foundation and thus, were contrary to law, the Tax Court stated that the Minister often does not have a complete factual matrix within which she must act. The Court added that subsection 299(3) of the Act deems an assessment to be valid and binding, subject to being vacated on an objection or appeal. On that basis, and relying on this Court's decision in *Canada v. Lux Operating Limited Partnership*, 2020 FCA 162, the Tax Court concluded that the issue of the validity of the assessments should proceed to trial on its merits.

[7] We find that the Tax Court committed no palpable and overriding error in determining that there was no clear admission, nor did it commit an error of law in addressing the issue of the validity of the assessments: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 6, 8, 10, 25, 36 and 37.

[8] We would add that the Supreme Court of Canada's decision in *Western Minerals Ltd. v. Minister of National Revenue*, [1962] S.C.R. 592, 34 D.L.R. (2d) 163 [*Western*] supports the conclusion that an assessment remains valid even if the Minister has not completed, or even begun, her audit. In so concluding, the Supreme Court agreed with the following comments:

> [T]here is no standard in the [Income Tax] Act or elsewhere, either express or implied, fixing the essential requirements of an assessment. It is exclusively for the Minister to decide how [s]he should, in any given case, ascertain and fix the liability of a taxpayer. The extent of the investigation [s]he should make, if any, is for [her] to decide.

(*Western* at p. 596.)

[9] While *Western* was decided in the context of the *Income Tax Act*, its reasoning applies to the *Excise Tax Act*. We do not see *Western* as being inconsistent with *J.P. Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250, [2014] 2 F.C.R. 557.

[10] Even if there was a clear admission that the Minister made no findings of fact in assessing, the Minister would bear the burden of proving at trial facts to support the assessments: *Loewen v. R.*, 2004 FCA 146, [2004] 4 F.C.R. 3 at para. 11. The admission would not, in itself, determine the input tax credits, if any, to which Iris is entitled. What matters here is the determination of the input tax credits—not the Minister's mental process: *R. v. Riendeau*, [1991] 2 C.T.C. 64, 45 D.T.C. 1416 (Fed. C.A.) at para. 4. This requires a trial.

[11] In a finding that can be set aside on the basis of palpable and overriding error—and there is none here—the Tax Court found "there is controversy as to the material facts, as to the applicable law, and as to the application of the law to the material facts." In such circumstances, summary judgment cannot be granted: *Georgeson Shareholder Communications Canada Inc. v. Canada*, 2020 FCA 139 at para. 9.

[12] Finally, it is unnecessary for us to provide a definitive interpretation of the meaning and scope of paragraph (a) of Rule 170.1 in this case. This being said, we would find it surprising if

the Rule were interpreted to allow statements made in another court, on different issues of questionable clarity and significance, to be taken as binding admissions in the Tax Court.

[13] Therefore, we will dismiss the appeal with costs.

"Nathalie Goyette"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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