Federal Court of Appeal | Cour d'appel fédérale

Date: 20240923

Docket: A-15-24

Citation: 2024 FCA 153

CORAM: **LOCKE J.A.**
GOYETTE J.A.
WALKER J.A.

BETWEEN:

KEYSTONE RV COMPANY

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Toronto, Ontario, on September 17, 2024.
Judgment delivered at Ottawa, Ontario, on September 23, 2024.

REASONS FOR JUDGMENT BY: WALKER J.A.

CONCURRED IN BY: LOCKE J.A.
GOYETTE J.A.

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REASONS FOR JUDGMENT

WALKER J.A.

[1] The appellant, Keystone RV Company, appeals an interlocutory decision of the Tax Court of Canada (Docket no. 2019-2692 (GST)G, *per* Justice R. MacPhee) dated December 15, 2023 (the Decision): (i) dismissing Keystone's motion for judgment on admissions pursuant to Rule 170.1 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a (the Rules); and (ii) granting the respondent's cross-motion to amend its Reply pursuant to Rule 54 of the

Rules. The Tax Court also awarded (i) the respondent costs on the Rule 170.1 motion, and (ii) costs in the cause in the Rule 54 motion.

[2] In its underlying appeal to the Tax Court, Keystone appeals a series of reassessments by the Canada Revenue Agency (CRA) dated February 21, 2018 under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act) in respect of seven monthly GST/HST reporting periods (January 1, 2014 – July 31, 2014). The result of the reassessments was the imposition on Keystone of an additional aggregate net GST/HST of $24,695,247.20.

[3] By letter dated November 14, 2022 sent during the course of the Tax Court proceedings, the respondent conceded that the correct net GST/HST adjustment for the reporting periods in question is $4,203,799.29 based on a series of adjustments set out in the letter. In reliance on this concession, Keystone brought its Rule 170.1 motion on December 6, 2022 on the grounds that (a) the only issue to be decided in the underlying appeal is whether the Minister correctly calculated Keystone's net GST/HST adjustment for the reporting periods; and (b) the November 14, 2022 letter was a clear admission that the Minister had not correctly calculated the GST/HST net tax adjustment.

[4] The respondent then filed the Rule 54 motion to amend its Reply consistent with the position expressed in the November 14, 2022 letter. Included as Schedule A to the Rule 54 notice of motion was the respondent's proposed amended Reply.

[5] The standard of review of the Tax Court's Decision in this appeal is that of palpable and overriding error for questions of fact and questions of mixed fact and law, and of correctness for questions of law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 8, 10 and 36). An error is palpable when it is obvious or plainly seen, and overriding when it affects the result (*Canadian Imperial Bank of Commerce v. Canada*, 2021 FCA 10 at para. 55).

[6] For the reasons that follow, I first find no error of law or palpable and overriding error in the Tax Court's analysis and rejection of Keystone's Rule 170.1 motion.

[7] Rule 170.1 provides in part that:

170.1 A party may, at any stage of a proceeding, apply for judgment in respect of any matter	**170.1** Une partie peut, à tout stade d'une procédure, et ce, sans attendre qu'il soit statué sur tout autre point litigieux entre les parties, demander :
(***a***) upon any admission in the pleadings or other documents filed in the Court, or in the examination of another party, or	***a)*** qu'il soit rendu jugement sur toute question, par suite d'un aveu fait dans les actes de procédure ou d'autres documents déposés à la Cour, ou fait au cours de l'interrogatoire d'une autre partie;

[8] In the Decision, the Tax Court correctly identified the principles relevant to a Rule 170.1 motion: namely, Rule 170.1 allows a party to apply for judgment at any stage in a proceeding only if "there is nothing in controversy, either regarding the facts or a fairly arguable legal issue" (*Georgeson Shareholder Communications Canada Inc. v. Canada*, 2020 FCA 139 at para. 9 (*Georgeson*); see also *Iris Technologies Inc. v. Canada*, 2023 FCA 127 at para. 11 (*Iris FCA*)).

[9] Keystone submits that the only issue before the Tax Court in the underlying appeal is whether the reassessments were correct. Keystone argues that its Rule 170.1 motion must therefore be granted because the Minister clearly admitted in the November 14, 2022 letter that the reassessments are incorrect and that a materially smaller net GST/HST tax adjustment is required.

[10] I disagree and find that the Tax Court made no palpable and overriding error in its application of the *Georgeson* test to Keystone's Rule 170.1 motion.

[11] Critical to its Rule 170.1 conclusion, the Tax Court found that, while significant in amount, the Minister's November 2022 concession did not eliminate the controversy between the parties: the Minister's assumptions that Keystone underreported GST on its taxable supplies and claimed invalid input tax credits during the reporting periods remain in dispute. I agree. There remain clear, material disagreements or disputes in the appeal. The parties' dispute must proceed to trial as few facts have been established and no discoveries held (*Iris FCA* at para. 10).

[12] In oral argument, Keystone argued that the November 14, 2022 letter and amended Reply together establish not only that the aggregate net GST/HST adjustment in the reassessments was incorrect but also that the CRA has abandoned the assumptions on which the reassessments were based and now asserts a different set of assumptions. Keystone argues that, as a result, the "matters" at issue in the underlying appeal have been conceded by the Minister and, accordingly, Keystone is entitled to judgment based on Rule 170.1.

[13] Keystone's argument regarding the "matters" at issue was not raised in its Rule 170.1 notice of motion and was not placed before the motions judge. As a result, Keystone cannot now argue that the motions judge erred in failing to draw this distinction. Similarly, although central to its oral submissions, Keystone did not assert in its notice of appeal or memorandum of fact and law in this appeal that the motions judge erred by focussing his Rule 170.1 analysis on the transactions and amounts at issue and not on the assumptions or matters set out in the Minister's Reply. For these reasons, I need not address the argument on appeal.

[14] In any event, I do not find Keystone's argument persuasive. While Rule 170.1 provides that a party may apply for judgment in respect of any matter, Keystone points to no authority that limits the *Georgeson* principle requiring no remaining conflict between the parties to specific matters or, in this case, specific assumptions made in a reassessment. In addition, none of subsections 298(6.1), (6.2) and (6.3) of the Act, the legislative bases for the amended Reply, make reference to a matter. To the contrary, the subsections make clear that the Minister may advance an alternative basis or argument in support of the assessment of a taxpayer, or in support of all or any portion of the amount originally determined on assessment.

[15] In its notice of appeal to this Court, Keystone submits that the Tax Court failed to consider the evidence before it of alleged improper and abusive conduct by the CRA in fabricating facts as the basis for the reassessments.

[16] The motions judge stated he did not have a factual foundation to assess the allegations of improper conduct, allegations not raised in the Rule 170.1 notice of motion, because there was

inadequate time to fully read and consider Keystone's voluminous evidence filed very shortly before the Tax Court hearing. The motions judge also stated that, in any event, the Rule 170.1 motion was not the vehicle to address the allegations. I agree. As stated above, at issue in the Rule 170.1 motion was whether the amount of net GST/HST owing by Keystone remains in dispute between the parties.

[17] Keystone next argues that the respondent's Rule 54 motion was an attempt to appeal the Minister's own assessment (*Continental Bank of Canada v. Canada*, [1998] 2 S.C.R. 358, 1998 CanLII 795) and was abusive.

[18] I disagree. The Tax Court made no reviewable error in exercising its discretion and granting the respondent's Rule 54 motion in light of its rejection of Keystone's Rule 170.1 motion. The Tax Court correctly noted the breadth of the parties' ability to amend their pleadings (*Canada v. Pomeroy Acquireco Ltd.*, 2021 FCA 187 (*Pomeroy*)) and applied subsections 298(3), (6.1), (6.2) and (6.3) of the Act. The amended Reply assists in determining the real questions in controversy between the parties, does not result in an injustice not compensable in costs and serves the interests of justice (*Pomeroy* at para. 4). The Tax Court did not err in finding that the respondent was permitted to reduce the amount reassessed and advance an alternative argument or basis in support of the reassessments, as it does in the amended Reply.

[19] I agree with the Tax Court that the Minister's concession was not an appeal of the Minister's assessment. A concession that results in the reduction of the amount assessed cannot be said to be an attempt by the Minister to appeal her assessment (*Beaulieu v. The Queen*, 2005

TCC 605, at paras. 43, 51–52, aff'd 2006 FCA 317). Keystone referred in oral argument to the recent decision in *TPine Leasing Capital Corporation v. Canada*, 2024 FCA 83 (*TPine*) in which this Court confirmed the principle that the Minister cannot appeal an assessment and stated that the principle must be considered in determining what alternative basis or argument the Minister may advance (*TPine* at paras. 84-85, 90). However, at issue in *TPine* was a prior version of subsection 152(9) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), a provision then materially different from subsections 298(6.1), (6.2) and (6.3) of the Act. Nevertheless, I would add that the motions judge's reasoning is consistent with *TPine*. He stated that the amended Reply put the same legislation and transactions in issue; caused no prejudice to Keystone as the motion was brought before discoveries; and did not seek to increase the amount of tax assessed against Keystone, all conforming with the requirements of subsections 298(3), (6.1), (6.2) and (6.3). I find that Keystone has not established a palpable and overriding error in the motions judge's analysis of the Rule 54 motion.

[20] Finally, I find no error warranting this Court's intervention in the Tax Court's awards of costs. I note in particular that, at the Tax Court hearing, Keystone's counsel stated Keystone was satisfied with the Tax Court's award of costs in the cause in the Rule 54 motion.

[21] Accordingly, I would dismiss the appeal with costs.

"Elizabeth Walker"
J.A.

“I agree.
Georges R. Locke J.A.”

“I agree.
Nathalie Goyette J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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REASONS FOR JUDGMENT BY:	WALKER J.A.
CONCURRED IN BY:	LOCKE J.A. GOYETTE J.A.
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