FEDERAL COURT OF APPEAL

B E T W E E N:

SODECIA CANADA INVESTMENTS INC.

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following pages.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at 180 Queen St. West, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, **WITHIN 10 DAYS** of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

April 22, 2024

Issued
by:_____
(Registry Officer)

Address of local office:
180 Queen Street West
Suite 200
Toronto, Ontario
M5V 3L6

TO:
Department of Justice Canada
Ontario Regional Office
Suite 400
120 Adelaide Street West
Toronto, Ontario
M5H 1T1

Brent Cuddy
Tel: (416) 258-1578
Fax: (416) 973-0810
brent.cuddy@justice.gc.ca

Counsel for the Respondent

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of Smith J. of the Tax Court of Canada dated March 27, 2024 ("**Judgment**") in the matter of *Sodecia Canada Investments Inc. v The King*, 2024 TCC 40 (Docket number: 2022-3160(IT)(G)) by which the appellant's appeal was quashed.

THE APPELLANT ASKS that:

a) the Judgment be set aside;

b) its appeal before the Tax Court be reinstated;

c) it be granted the costs of this appeal and the appeal to the Tax Court; and

d) it be granted such further and other relief as this Honourable Court may deem just.

BACKGROUND

1. This appeal seeks error-correction, based on errors of law, and palpable and overriding errors of fact and mixed fact and law. The appellant is not seeking to make law, but rather to have accepted law properly interpreted and applied to facts established by evidence.

2. The motion in the Tax Court was a "mailing" case:[1] The appellant asserted that it could not locate a non-resident tax notice of assessment for its 2013 taxation year, which the minister of national revenue ("**minister**") claimed was sent on or about June 8, 2017, and

further asserted that the minister did not send any such notice of assessment until June 2022 ("**assessment**").

3. On June 11, 2022, the appellant filed a notice of objection ("**objection**") to the assessment, which was within the time limited for so doing under the *Income Tax Act* (Canada) (the "**Act**").[2] More than 90 days later the appellant appealed to the Tax Court.

4. The respondent brought a motion to quash on the basis of procedural deficiency, alleging that the assessment was sent in June 2017, therefore the objection was out of time.

5. The Tax Court quashed the appeal.

THE GROUNDS OF APPEAL are as follows:

Legal Errors

6. The Tax Court misinterpreted s. 244(14) and *Canada (National Revenue) v ConocoPhillips Canada Resources Corp.,* 2014 FCA 297 ("***ConocoPhillips***") (an authority that was not argued by either party in this case, because it is irrelevant). The Judgment held that there is a presumption that a notice of assessment/reassessment was mailed on the date on the notice. That is incorrect. Section 244(14) creates a date presumption, not a mailing/sending presumption: where a notice is mailed or sent, it is presumed to have been mailed or sent on the date on the notice. This provision connects with the deemed receipt rule in s.248(7)(a). However, the initial condition preceding the date presumption is mailing/sending and *that* must be proven by the respondent.

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[1] The substance of the income tax dispute concerns the correct withholding tax rate on a deemed dividend arising from the appellant's redemption of 30 shares owned by a United States entity, AZ Newco, LLC.
[2] All statutory references are to the Act unless otherwise noted.

7. The four-step legal test in mailing cases, set out at paragraph 6 of *Mpamugo v. The Queen*, 2016 TCC 215 (aff'd 2017 FCA 136), has been followed by the Tax Court. The relevant steps in this case are the first two, but the third and fourth are included as they help demonstrate where the Tax Court erred in the appellant's case:

   a. Step 1: The taxpayer must assert that the Notice of Assessment was not mailed. A taxpayer normally does so in one of two ways. The taxpayer may assert that he or she did not receive the Notice of Assessment and thus believes that it was not mailed. Alternatively, the taxpayer may assert that the Notice was mailed to the wrong address through no fault of the taxpayer and was thus, in effect, not mailed.

      The taxpayer's credibility may be assessed at Step 1, according to paragraph 12 of this Court's judgment affirming the Tax Court's reasoning in *Mpamugo.*

   b. Step 2: If the taxpayer asserts that the Notice of Assessment was not mailed, the Minister must introduce sufficient evidence to prove, on a balance of probabilities, that the Notice of Assessment was indeed mailed or, if the taxpayer has asserted that it was mailed to the wrong address, that it was mailed to the address that the CRA properly had on file.

   c. Step 3: If the Minister is able to prove that the Notice of Assessment was indeed mailed, then the mailing is presumed to have occurred on the date set out on the Notice (subsection 244(14)). This is a rebuttable presumption. The taxpayer may introduce evidence to prove that it was actually mailed on a different date. The deadline for filing a Notice of Objection is calculated from the mailing date established by this step (subsection 165(1)). The "normal reassessment period" for a tax year also commences from the mailing date established by this step (subsection 152(3.1)).

   d. 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. The date on which an assessment is made is used to determine whether a reassessment was made outside of the "normal reassessment period" of a tax year (subsection 152(4)). Step 4 is not strictly relevant for the purposes of determining the deadline for filing a Notice of Objection. That determination is made in Step 3. Step 4 simply makes it clear that the fact that a taxpayer did not actually receive the Notice of Assessment is irrelevant.

      [emphasis in original]

8. These steps are sequential. The standards differ at certain steps. Step 1 requires a credible assertion of non-receipt by a taxpayer. The credible assertion standard makes sense, since it is nearly impossible to prove a negative. Step 2 requires the respondent to adduce proof of mailing, evaluated on the civil standard. That is logical: the Canada Revenue Agency is the largest agency of the government of Canada and communicates important information by mail, thus it must have mailing procedures in place and the resources to keep adequate records to prove whether something has been sent. Mailing should be provable, whereas non-receipt can only be asserted.

9. The structure of the "Analysis and Discussion" portion of the Judgment confirms that, although the Tax Court quoted *Mpamugo*, the Tax Court's approach was, respectfully, inverted. The Judgment merged a misunderstanding of the statutory presumption and an irrelevant case (*ConocoPhillips*) with the correct approach (*Mpamugo*), despite their incompatibility.

10. The path to localizing the legal errors begins at paragraph 81, at the termination of the Analysis and Discussion section: "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". Again, the appellant's case is determinable solely on Steps 1 and 2 of *Mpamugo*. The s. 244(14) date presumption applies at Step 3, after: a credible assertion of non-receipt by the appellant; and, proof of mailing by the respondent.

11. The structure of the Analysis and Discussion further supports the conclusion that the Judgment was predicated on the misunderstanding that the respondent must prove mailing and the appellant must rebut. The Tax Court's error in this regard is patent:

something that is proven is not susceptible to being rebutted, and proving a negative is virtually impossible. Properly interpreted, *Mpamugo* provides the test. If the right test was followed, the evidence would have been properly appraised and, although it is inappropriate to ask an appellate court to reweigh evidence, reviewing it is an inescapable part of fixing the Tax Court's errors. Fortunately, it is a straightforward exercise.

The Respondent's Evidence Was Insufficient to Meet Step 2

12. The fact-finding portion of the Judgment began with the respondent's evidence. The Judgment held that the respondent established on a balance of probabilities that the subject assessment was sent to the appellant on June 8, 2017. Respectfully, that conclusion was not supported by the record.

13. The Judgment described the respondent's witnesses as credible, convincing and unshaken by cross-examination. That description is challenged by the reality that the respondent's witness Michele Nguyen's affidavit included few salient facts, and her evidence on cross-examination contradicted rather than affirmed those facts. Her evidence was not credible, convincing and unshaken. Respectfully, relying on her evidence to conclude that the assessment was mailed on June 8, 2017, is a palpable and overriding error.

14. Grant Hutter is a CRA officer. The evidence in his affidavit and testimony concerned CRA processes and records. Neither his affidavit nor testimony established that a June 8, 2017 assessment was sent to the appellant in 2017. While a batch cycle described as 1927 may have run in June 2017, there are gaps in the evidence to connect that print run with any assessment to the appellant.

15. Joanna Myers is a CRA officer. The evidence in her affidavit and testimony concerned CRA processes and records. The majority of the relevant records had been purged. She said she reviewed records, but her affidavit included no exhibits. Key assertions in her affidavit were based on information from another affiant and her belief. She did not retrace any of the steps taken by said affiant, had never worked with him before, had no thoughts about his reputation for veracity and admitted that she had only met that affiant 15 minutes before appearing in court. Neither her affidavit nor testimony established that a June 8, 2017 assessment was sent to the appellant in 2017.

16. The standard of proof at Step 2 of the *Mpamugo* test is balance of probabilities. The facts, properly found, fall markedly short of that threshold.

The Appellant's Evidence Met Step 1 under a Proper Interpretation of the Law

17. The *Mpamugo* Step 1 bar is low. It requires a credible assertion of non-receipt. Paragraph 81 of the Judgment stated: "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." Respectfully, the conclusion at paragraph 81 is the culmination of a series of errors. The legal error concerning the rebuttable presumption was discussed above. The further error at Step 1 is that evidence at that step does not have to be conclusive.

18. The Judgment mistakenly sets a higher bar than "credible assertion". At paragraph 74, the Judgment stated that there were gaps in the appellant's evidence, including that the appellant's mail could have been left unattended in the lobby of its building. That was wrong. The appellant's witness Shirley Quick or her counterpart would generally receive mail directly in hand from the Canada Post carrier, whom they could see enter the lobby

through an internal office window. If they weren't at their desks, the carrier would open the foyer window and place the mail *inside*. The other concern was that Quick did not have specific recollection of the assessment, which was described as not surprising. Quick was specific about: what she did with mail pertaining to tax; where and how tax information was filed; how their files were moved and preserved; record retention periods; and that the subject assessment could not be found when she searched. Quick's evidence contradicts the possibility discussed at paragraph 80 of the Judgment that because the appellant was relocating its office, the assessment could have been set aside for later and lost or forgotten.

19. Wilma Luesink's evidence was also inconsistent with the fact-finding. She testified that she would look at any mail related to financial and tax matters and, if the matter was to be dealt with by others then she would ensure that *a copy* was sent to them. She stated repeatedly that original documents would be filed in the cabinets with all other financial and tax information. The evidence contradicts the fact-finding at paragraphs 77 and 78 of the Judgment. Luesink also testified that she managed files for different Sodecia entities, contradicting the conclusion that, because Quick and Luesink worked for Sodecia Automotive London Inc., that mail for a related Sodecia entity would not have been their concern. Such a conclusion does not accord with either the evidence or common sense.

20. The chain of continuity for mailed financial and tax information was sound. If specific memory of a single document was a requirement to credibly assert non-receipt, then no taxpayer could possibly succeed in a "mailing" case. That cannot be right and, again, the bar at Step 1 of *Mpamugo* is not proof on a balance of probabilities. The requirement is to credibly assert non-receipt. That bar was easily surpassed based on the evidence.

Further Issues Cast Doubt on the Judgment

21. Respectfully, the Tax Court made further factual errors and concerned itself with irrelevancies which, while not directly relevant to this appeal, call into question the robustness of the fact-finding generally, including:

    a. At paragraph 12 of the Judgment, the appellant was described as a non-resident of Canada. That is incorrect. The appellant is tax-resident in Canada, as pled in the notice of appeal and as supported by documents appended to the affidavit of Jose Antunes, one of the appellant's witnesses on the motion. Moreover, it is unclear why the redemption by a non-resident of shares held by a non-resident would be a taxable event in Canada in any case.

    b. At paragraphs 66, 67 and 68 of the Judgment, the Tax Court discussed the timing for the appellant's change of address and its name change, stating that these matters were not addressed or explained. Those matters were not addressed or explained because they are irrelevant to the motion and the appeal, and they need not have been discussed in the Judgment at all.

22. Such further and other grounds as counsel may advise.

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John A. Sorensen
Gowling WLG (Canada) LLP
Suite 1600, 100 King St. West
Toronto, ON
M5X 1G5

Tel: (416) 369-7226
Fax: (416) 862-7661
john.sorensen@gowlings.com

Counsel for the appellant