

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20170623**

**Docket: A-407-16**

**Citation: 2017 FCA 136**

**CORAM: WEBB J.A.  
NEAR J.A.  
GLEASON J.A.**

**BETWEEN:**

**LAWRENCE MPAMUGO**

**Appellant**

**And**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on June 6, 2017.

Judgment delivered at Ottawa, Ontario, on June 23, 2017.

**REASONS FOR JUDGMENT BY:**

**WEBB J.A.**

**CONCURRED IN BY:**

**NEAR J.A.  
GLEASON J.A.**

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**REASONS FOR JUDGMENT**

**WEBB J.A.**

[1] This is an appeal from the Order of Graham J. (Tax Court judge) quashing Mr. Mpamugo's appeal to the Tax Court of Canada (Tax Court) (2016 TCC 215).

[2] Mr. Mpamugo was charged with fraud in 1999 in relation to the operation of Credit Valley Institute of Business and Technology and he was convicted in 2004. After he was charged

with fraud, he was reassessed under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (ITA) for 1998 (on March 23, 2000) and 1999 (four times with the latest on March 8, 2001) for unreported income in the amount of approximately \$6.8 million. He was also reassessed for the years 2000 to 2002 but the amounts were relatively small for these years. The latest reassessment for 2000 to 2002 was issued on July 2, 2008.

[3] Mr. Mpamugo attempted to appeal the reassessments related to his 1998 to 2002 taxation years to the Tax Court by a notice of appeal filed on August 21, 2015. The Crown brought a motion to quash this appeal on the basis that Mr. Mpamugo had not served a valid notice of objection prior to filing his notice of appeal. Mr. Mpamugo did submit a document dated June 24, 2014 to the Canada Revenue Agency which was identified as a notice of objection. However, based on the dates of the notices of reassessment, this was long after the time had expired for:

- (a) serving a notice of objection under subsection 165(1) of the ITA; or
- (b) requesting, under section 166.1 of the ITA, an extension of time to serve a notice of objection

for any of the taxation years from 1998 to 2002.

[4] In response to the Crown's motion to quash Mr. Mpamugo's notice of appeal, Mr. Mpamugo raised, for the first time, the issue of whether the notices of reassessment had been mailed to him. There is no reference to this issue in either the document sent to the CRA as a notice of objection in 2014 or in his notice of appeal filed with the Tax Court in 2015. This issue is relevant because the limitation period for filing a notice of objection started with the mailing

of a notice of assessment or reassessment (subsection 165(1) of the ITA). The ITA was amended in 2010 to replace the reference to “mailing” with “sending”.

[5] The Tax Court judge, after hearing all of the evidence, concluded that he did not find Mr. Mpamugo to be a credible witness (paragraph 32 of his reasons). As a result, he found that there was no evidence to support any finding that the notices of reassessment (of which there were several) were mailed to the wrong address or that they were not received. Therefore, he found that there was no basis to infer that the notices of reassessments had not been mailed to Mr. Mpamugo on the dates identified in the notices of reassessment.

[6] In his appeal, Mr. Mpamugo first attempted to challenge the admissibility at the Tax Court hearing of certain documents that were used to impeach his credibility during his cross-examination. These documents included two affidavits of Mr. Mpamugo – one dated April 22, 2007 and the other dated November 2004. However, the admissibility of these documents at the Tax Court hearing was not a matter that Mr. Mpamugo had raised in his notice of appeal to this Court or in his memorandum of fact and law. It was too late at the hearing of his appeal to raise this new issue. In any event, it is far from clear on what basis a previous affidavit of a witness could not be introduced, on the cross examination of that witness, to challenge his or her credibility.

[7] As a slight variation of the first argument, Mr. Mpamugo argued that the Tax Court judge erred by basing his credibility finding with respect to Mr. Mpamugo, in part, on the cross-examination of him in relation to his previous affidavits. However, the use of prior inconsistent

statements (especially prior sworn statements) to impeach (or attempt to impeach) the credibility of a witness is a common tactic in any litigation, including tax litigation. The Tax Court judge did not commit any error by allowing Mr. Mpamugo to be cross-examined based on his previous affidavits or in basing his credibility finding on any inconsistency between Mr. Mpamugo's oral testimony and his prior affidavits.

[8] A fair reading of the reasons of the Tax Court judge leads to the conclusion that he based his credibility finding not only on the inconsistent statements of Mr. Mpamugo but also on the improbability of Mr. Mpamugo's version of events. Mr. Mpamugo, in this appeal, has not raised any argument that would justify interfering with the credibility finding of the Tax Court judge.

[9] Mr. Mpamugo also argued that the Tax Court judge committed an error by relying on the evidence presented by the Crown in relation to whether the notices of reassessment had been mailed. The Tax Court judge noted that the affidavit of Mr. Costigan, a litigation officer with CRA, did not meet the requirements of subsection 244(10) of the ITA. He also stated, in paragraph 30 of his reasons, that he would not give Mr. Costigan's statements related to the mailing of the notice of reassessments a lot of weight.

[10] However, after weighing all of the evidence (which was his role), the Tax Court judge concluded that it was more likely than not that the notices of reassessment were mailed to Mr. Mpamugo. The Tax Court judge noted that Mr. Mpamugo had conceded that if it was found that the notices of reassessment were mailed, then it would follow that they were mailed on the dates as claimed by the Crown. I am not persuaded that the Tax Court judge committed any error in

making his finding that the notices of reassessment had been mailed to Mr. Mpamugo on the dates as identified by the Crown.

[11] The Crown raised an issue in relation to the four steps as set out by the Tax Court judge, in paragraph 6 of his reasons, as the steps to be followed when a taxpayer alleges that a notice of reassessment has not been sent. The first step is that the taxpayer asserts that the notice of reassessment was not sent. The second step, following this assertion, is that the Minister must introduce evidence to establish, on a balance of probabilities, that the notice of reassessment was sent. He concludes, in paragraph 10, that the credibility of the taxpayer is to be assessed at step 2. It is this conclusion that the Crown is challenging.

[12] I agree with the Crown that it would not be an error for a Tax Court judge to initially assess the credibility of a taxpayer who alleges that he or she did not receive a notice of reassessment (and therefore bring into question whether it was sent). If a Tax Court judge were to determine that the taxpayer was not credible in saying that a notice of reassessment was not received, it would seem to me that this would mean that the Tax Court judge would directly or indirectly be finding that the notice of reassessment was received by the taxpayer. If it was received it must have been sent. If that is the finding there would not be any need for any further proof that the notice of reassessment was sent. Of course, any finding of credibility could only be made after all of the evidence has been heard.

[13] I would dismiss the appeal, with costs.

"Wyman W. Webb"

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J.A.

"I agree.

D.G. Near J.A."

"I agree.

Mary J.L. Gleason J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-407-16

**APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE GRAHAM OF  
THE TAX COURT OF CANADA, DATED SEPTEMBER 28, 2016, DOCKET NO. 2015-  
3908(IT)(G)**

**STYLE OF CAUSE:** LAWRENCE MPAMUGO v. HER  
MAJESTY THE QUEEN

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 6, 2017

**REASONS FOR JUDGMENT BY:** WEBB J.A.

**CONCURRED IN BY:** NEAR J.A.  
GLEASON J.A.

**DATED:** JUNE 23, 2017

**APPEARANCES:**

Lawrence Mpamugo (Self-represented) FOR THE APPELLANT

Craig Maw FOR THE RESPONDENT  
Tony Cheung

**SOLICITORS OF RECORD:**

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of Canada