

Date: 20080923

Docket: A-20-08

Citation: 2008 FCA 284

**CORAM: DESJARDINS J.A.
NOËL J.A.
TRUDEL J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

WILLIAM L. GRAY

Respondent

Heard at Fredericton, New Brunswick, on September 23, 2008.

Judgment delivered from the Bench at Fredericton, New Brunswick, on September 23, 2008.

REASONS FOR JUDGMENT OF THE COURT BY:

NOËL J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Fredericton, New Brunswick, on September 23, 2008)

NOËL J.A.

[1] This is an appeal from a judgment of the Tax Court of Canada dated December 11, 2007 allowing the respondent's appeal filed with respect to his 2002 taxation year and quashing the reassessment dated February 24, 2006 on the basis it was not issued within the normal reassessment period set out in subsection 152(3.1) of the *Income Tax Act*, R.S.C. 1985, ch. 1 (5th Supp.) (the Act).

[2] The only issue in this appeal is the validity of the reassessment issued with respect to the respondent's 2002 taxation year. The underlying liability stems from withdrawals made by the respondent from his Registered Retirement Savings Plan (RRSP) which were not reported for income tax purposes. These unreported withdrawals are admitted.

[3] A reconstructed notice of assessment for the respondent's 2002 taxation year dated June 5, 2003 (hereinafter "the first assessment") was entered as evidence at trial the effect of which was to accept the respondent's return as filed and provide for a refund in the amount of \$235.58. While the name and the address appearing on the Notice were recognized by the respondent as being correct, he took the position that he never received it.

[4] A Notice of Reassessment was subsequently issued on February 24, 2006 (hereinafter "the second assessment") adding to the respondent's income for the year 2002, the RRSP withdrawals made in that year and claiming the unpaid taxes.

[5] The respondent took issue with the second assessment and the Tax Court Judge allowed the appeal which ensued. He found as a fact that the first assessment was never received by the respondent and consequently he held that the second assessment was too late, and therefore invalid.

[6] This is the decision under the appeal.

Decision

[7] The appeal must succeed. In our view, the Tax Court Judge erred in law in failing to determine when the normal reassessment period began to run on the facts before him. Had he done so, he would have been bound to conclude that the second assessment was not out of time.

[8] Subsection 152(3.1) defines the “normal reassessment period” as follows:

(3.1) For the purposes of subsections (4), (4.01), (4.2), (4.3), (5) and (9), the normal reassessment period for a taxpayer in respect of a taxation year is

(a) where at the end of the year the taxpayer is a mutual fund trust or a corporation other than a Canadian-controlled private corporation, the period that ends 4 years after the earlier of the day of mailing of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of mailing of an original notification that no tax is payable by the taxpayer for the year; and

(b) in any other case, the period that ends 3 years after the earlier of the day of mailing of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of mailing of an

(3.1) Pour l'application des paragraphes (4), (4.01), (4.2), (4.3), (5) et (9), la période normale de nouvelle cotisation applicable à un contribuable pour une année d'imposition s'étend sur les périodes suivantes :

a) quatre ans suivant soit le jour de mise à la poste d'un avis de première cotisation en vertu de la présente partie le concernant pour l'année, soit, s'il est antérieur, le jour de mise à la poste d'une première notification portant qu'aucun impôt n'est payable par lui pour l'année, si, à la fin de l'année, le contribuable est une fiducie de fonds commun de placement ou une société autre qu'une société privée sous contrôle canadien;

b) trois ans suivant le premier en date de ces jours, dans les autres cas.

original notification that no tax is payable by the taxpayer for the year.

[my emphasis]

It is also useful to note that subsection 248(1) of the Act defines an “assessment” as including a reassessment and subsection 152(8) provides that an assessment is deemed to be valid notwithstanding any error, defect or omission in the assessment.

[9] Against this background, two possibilities arise from the Tax Court Judge’s finding that the first assessment was never received. Either it was mailed by Revenue Canada but never reached the respondent or it was never mailed. Under both scenarios the second assessment is valid.

[10] If the first assessment was mailed on June 5, 2003, the three year limitation period is computed from that time, and the second assessment having been issued on February 26, 2006 is within the three year period. If the first assessment was never mailed, the three year period has not begun to run, and therefore the limitation period had yet to start when the second assessment was issued.

[11] It follows that there is no basis in law for the Tax Court Judge’s conclusion that the second assessment was out of time, and therefore invalid.

[12] The appeal will be allowed, the Judgment of the Tax Court will be set aside and Judgment will be rendered on the basis that the 2006 reassessment was validly issued. Since this matter came before us pursuant to the informal procedure, and the appeal is that of the Crown, the respondent is entitled to his reasonable and proper costs pursuant to section 18.25 of the *Tax Court of Canada Act*.

"Marc Noël"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-20-08

**APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA DATED
DECEMBER 11, 2007, DOCKET NO. 2007-1684(IT)I.**

STYLE OF CAUSE: HER MAJESTY THE QUEEN v.
WILLIAM L. GRAY

PLACE OF HEARING: Fredericton

DATE OF HEARING: September 23, 2008

REASONS FOR JUDGMENT OF THE COURT BY: DESJARDINS, NOËL, TRUDEL
J.J.A.

DELIVERED FROM THE BENCH BY: NOËL J.A.

APPEARANCES:

Ms. Lynn W. Gillis FOR THE APPELLANT

Mr. William L. Gray FOR THE RESPONDENT

SOLICITORS OF RECORD:

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