Federal Court of Appeal | Cour d'appel fédérale

Date: 20090624

Docket: A-401-08

Citation: 2009 FCA 217

CORAM: **NADON J.A.**
SHARLOW J.A.
RYER J.A.

BETWEEN:

FMC TECHNOLOGIES COMPANY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on June 24, 2009.

Judgment delivered from the Bench at Ottawa, Ontario, on June 24, 2009.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on June 24, 2009)

RYER J.A.

[1] FMC Technologies Company, a successor to FMC Offshore Canada Company, (the "appellant"), made a request, pursuant to paragraph 164(1)(*b*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "ITA"), for a refund of overpayments of tax in respect of its 1999 to 2002 taxation years. The appellant claims that the overpayments arose out of payments made by Petro-Canada in 2004 as a result of assessments (the "Petro-Canada assessments") made against it.

[2] The Petro-Canada assessments were issued pursuant to subsection 227(10) of the ITA. These assessments were based on the Minister's allegation that Petro-Canada was obligated, pursuant to subsection 105(1) of the *Income Tax Regulations*, C.R.C., c. 945 (the "ITR"), to withhold and remit 15% of the amount that it paid to FMC International A.G. ("FMCI"), a non-resident of Canada that was related to the appellant, in respect of services that FMCI provided to Petro-Canada in Canada.

[3] Petro-Canada initially challenged these assessments but when they were confirmed by the Minister, Petro-Canada did not appeal to the Tax Court of Canada. The appellant filed a notice of appeal with respect to the Petro-Canada assessments. The Tax Court of Canada quashed this appeal on the basis that the appellant had no standing to challenge Petro-Canada's assessments.

[4] By correspondence dated January 8, 2007, the Minister denied the appellant's request for a refund on the basis that the appellant had no overpayments of tax in the years under consideration. In that correspondence, the Minister stated that the amounts paid by Petro-Canada pursuant to the Petro-Canada assessments were credited to the account of FMCI and not to the appellant.

[5] The appellant applied for judicial review of the Minister's decision on the basis that the Minister should have credited the tax that was paid pursuant to the Petro-Canada assessments to the appellant's account, rather than FMCI's account, and if that had been done, there would have been overpayments of tax in the appellant's account.

[6] Justice Mactavish of the Federal Court dismissed the application for judicial review on the basis that it was beyond the jurisdiction of that Court. She found that the application was, in substance, a challenge to the Petro-Canada assessments, which was a matter that fell within the exclusive jurisdiction of the Tax Court of Canada.

[7] The application judge then went on to consider the argument that the Minister should have credited the tax payments to the tax account of the appellant, rather than FMCI. After analysing the legal relationships between the appellant, FMCI and Petro-Canada, the application judge concluded that the Minister had correctly interpreted those relationships and that the tax payments made by Petro-Canada had been correctly credited by the Minister to FMCI's account. As a result, she concluded that the appellant had no overpayments for the taxation years in issue.

[8] In this appeal, the appellant argues that the application judge erred in concluding that the Federal Court had no jurisdiction to entertain the application for judicial review and in concluding that the appellant had no overpayments of tax in the years under consideration.

[9] In our view, the Minister's decision to reject the application for a refund was correct. Accordingly, we do not consider it necessary, in this case, to address the issues of jurisdiction and standard of review.

[10] To succeed in its request for a refund pursuant to paragraph 164(1)(*b*) of the ITA, the appellant must establish that it has an “overpayment”, within the meaning of paragraph 164(7)(*b*) of the ITA, which reads as follows:

164.(7) In this section, "overpayment" of a taxpayer for a taxation year means	164.(7) Au présent article, un paiement en trop fait par un contribuable pour une année d’imposition est égal au montant suivant :
. . .	[…]
(*b*) where the taxpayer is a corporation, the total of all amounts paid on account of the corporation’s liability under this Part or Parts I.3, VI or VI.1 for the year minus all amounts payable in respect thereof.	*b*) si le contribuable est une société, le total des sommes versées sur les montants dont la société est redevable en vertu de la présente partie ou des parties I.3, VI ou VI.1 pour l’année, moins ces mêmes montants.

Thus, for each year in issue, the appellant must establish that the total of all amounts paid on account of its tax liability for the year exceeds the amounts assessed against it for that year.

[11] The appellant asserts that the amounts paid pursuant to the Petro-Canada assessments are amounts paid on account of its tax liability for the years in question. However, there is no factual support for this assertion. Indeed, the record establishes that those amounts were, in fact, credited to the tax account of FMCI. Accordingly, the appellant has failed to establish that the requirements of the definition of overpayment in paragraph 164(7)(*b*) of the ITA have been met. It follows that the Minister was correct in concluding that the appellant had no overpayments of tax for its 1999 to 2002 taxation years.

[12] The appellant was left to assert, as it did before the application judge, that the amounts paid pursuant to the Petro-Canada assessments ought to have been credited to its tax account because those amounts were based on contractual payments that, as a matter of law, were not payable to FMCI, but only to the appellant, by virtue of an equitable assignment. In our view, even if as between the appellant, FMCI and Petro-Canada, the assignment had the legal effect that the appellant alleges, it would still be the case that the appellant does not have an overpayment, within the meaning of paragraph 164(7)(*b*) of the ITA. That definition does not ask how the amounts in question ought to have been credited, rather it asks how they were, in fact, credited.

[13] For the foregoing reasons, the appeal will be dismissed with costs.

"C. Michael Ryer"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-401-08
(APPEAL FROM A DECISION OF MACTAVISH J. OF THE FEDERAL COURT DATED JULY 15, 2008 (2008 FC 871))	
STYLE OF CAUSE:	FMC Technologies Company v. Her Majesty the Queen
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	June 24, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	(Nadon, Sharlow, Ryer JJ.A.)
DELIVERED FROM THE BENCH BY:	RYER J.A.

APPEARANCES:

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