Federal Court of Appeal Cour d'appel fédérale

Date: 20231219

Docket: A-20-23

Citation: 2023 FCA 247

CORAM: **GLEASON J.A.**
LEBLANC J.A.
HECKMAN J.A.

BETWEEN:

POLARSAT INC.

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Montréal, Quebec, on December 19, 2023.
Judgment delivered from the Bench at Montréal, Quebec, on December 19, 2023.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Montréal, Quebec, on December 19, 2023).

LEBLANC J.A.

[1] The appellant appeals from an Order of the Tax Court of Canada (the Tax Court), dated January 25, 2023 (*per* Favreau J.): 2023 TCC 10. The Tax Court permitted the respondent, pursuant to section 54 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, to file an amended Reply to the Notice of Appeal.

[2] The appeal before the Tax Court puts at issue the appellant's status as a Canadian Controlled Private Corporation and its entitlement to an enhanced refundable investment tax credit pursuant to subsection 127(10.1) of the *Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.) (the Act) for the 2011 to 2015 taxation years. The amended Reply introduces an alternative argument based on the general anti-avoidance rule (GAAR).

[3] It is trite—and the Tax Court expressly referred to this guiding principle at paragraph 53 of its decision—that an amendment to a pleading should be allowed if it (i) assists the tribunal in determining the real questions in controversy, (ii) does not result in an injustice to the other party not compensable by costs and (iii) serves the interests of justice (*El Ad Ontario Trust v. Canada*, 2023 FCA 231 at para. 4 (*El Ad Ontario*), citing *Canada v. Pomeroy Acquireco Ltd.*, 2021 FCA 187, 462 D.L.R. (4th) 577 at para. 4 (*Pomeroy*)).

[4] It is also trite that the decision to permit or not an amendment to a pleading is entirely within the discretion of the Tax Court. Decisions of this type are to be reviewed by this Court under the standard of review set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. This means that absent an error on a question of law or an extricable legal principle, such decisions are reviewable on the highly deferential standard of palpable and overriding error (*El Ad Ontario* at para. 8, citing *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology,* 2016 FCA 215, [2017] 1 F.C.R. 331 at para. 79; *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46 (*South Yukon Forest*).

[5] The appellant contends that the Tax Court made three reviewable errors. First, it submits that the Tax Court committed a palpable and overriding error by finding that it had entered into "aggressive tax planning", an "unwarranted finding", it says, that tainted the Court's whole analysis. Although it is unsure of what the Tax Court meant by this, the appellant speculates that if this meant that the appellant engaged in "abusive" tax planning, then this would usurp the role of the trial judge in determining the GAAR alternative argument. Otherwise, the appellant says that the Tax Court judge erred by "superseding his personal opinion on the nature and character of the transactions to the application of the legal framework."

[6] We see no merit to this contention. At best, this "finding" is a general observation that taxpayers who attempt to minimize their tax burden through complex plans should not be surprised if the respondent challenges those plans on the basis of the GAAR, a possibility, the Tax Court noted, that was raised in this case at the audit level. That observation—in the form of an *obiter*—was made in response to the appellant's concerns that the respondent had changed its mind with respect to its pre-trial position regarding the use of the GAAR. We see no error on the part of the Tax Court in making that observation. Put differently, the appellant reads too much into it.

[7] The appellant then submits that the Tax Court erred by not requiring the respondent to justify its amendment by adducing evidence relevant to the determination of the motion and by explaining why "after having taken the institutional position that GAAR was not applicable for the last nine (9) years, [it] suddenly changed its mind."

[8] Again, we do not see any merit to this contention. As stated above, amendments should be allowed "at any stage of an action" (*Pomeroy* at para. 4), provided they assist in determining the real questions in controversy between the parties, do not result in an injustice not compensable in costs and serve the interests of justice. As alluded to by the Tax Court, this test is anchored in section 152(9) of the Act, which allows the respondent, subject to certain limitations, to advance an alternative argument in support of an assessment "[a]t any time after the normal reassessment period."

[9] The Tax Court was satisfied that the respondent's evidence—that of a paralegal with no personal knowledge of the facts of the case—was satisfactory "in its present form because no new facts requiring personal knowledge by the deponent and not already mentioned in the pleadings [had] been advanced in the notice of motion." In our view, this finding was open to the Tax Court based on the record before it.

[10] It was open to it as well to conclude that the respondent "should not be precluded from adding an alternative argument in a reply because some officers of the CRA, no matter how important they are, have decided not to do so in the pre-trial steps." We agree with the respondent that concluding otherwise would impose on it an additional burden not contemplated in the test to amend. We also agree that the appellant's reliance on this Court's decisions in *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459 (*Merck*) and *Apotex Inc. v. Bristol-Myers Squibb Company*, 2011 FCA 34, 414 N.R. 162 (*Apotex*) is of little, if any, assistance to it as those cases (i) deal with non-tax-related matters, (ii) in the case of *Merck* pertain to amendments to withdraw substantial admissions, where the burden for the party

seeking the amendments is much heavier (*Merck* at para. 32; *Apotex* at para. 3), and most importantly (iii) do not support the proposition that the moving party has the burden of proving the facts justifying the amendments, as opposed to demonstrating that the test for amendment is met.

[11] Finally, the appellant contends that the Tax Court erred in concluding that the amendments would not result in an injustice not compensable in costs. It says that what is truly relevant under the GAAR's avoidance transaction concept is not the existence of the transaction or series of transactions, as determined by the Tax Court, but their intended purposes. As such, the appellant asserts that it will suffer non-compensable prejudice because its ability to adduce evidence at trial on the purpose of the transactions at issue will be significantly reduced due to the fact that it is not able to contact and locate the shareholders who allegedly authorized and decided these transactions.

[12] Whether amendments will result in an injustice to a party is a factually suffused finding. Here, the Tax Court did consider the appellant's evidence on its inability to contact and locate these shareholders but found that its Chief Executive Officer, who had personal knowledge of all the transactions at issue and access to all the corporate and financial records of the parties involved in these transactions, including corporate planning strategies and tax opinions, would be able to adduce evidence "on the object and purpose" of the transactions. In other words, the Tax Court was satisfied, based on the evidence before it, that there were other means available to the appellant to adduce evidence on the object and purpose of the transactions subject to the GAAR analysis. More importantly, we are not satisfied, when the Order is read as a whole, that the Tax

Court confused the mere existence of the transactions with their purpose, as contended by the appellant.

[13] We can only interfere with this finding in the presence of a palpable and overriding error, that is of an error that is obvious and which goes to the very core of the outcome of the case (*South Yukon Forest* at para. 46). We are satisfied that the evidence on record supports this finding and that as a result, it withstands scrutiny.

[14] For all these reasons, the appeal is dismissed, with costs.

"René LeBlanc"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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