

Notice Requirements for Hearsay Exceptions in Tax Trials

Author : admin

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Notice Requirements for Hearsay Exceptions in Tax Trials

Boroumand v Canada, [2016 FCA 313](#)

At issue was the question of what constitutes notice under the [Canada Evidence Act](#) when seeking to rely on a statutory hearsay exception. This was an appeal from [2015 TCC 239](#).

This case shows the importance of trial counsel knowing the rules of procedure and following them. Absent this, appeal counsel are unlikely to succeed despite able argument or merits of the case.

See CanLII Comment [HERE](#)

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FACTS

The Appellant taxpayer was assessed under the [Income Tax Act](#) and the [Excise Tax Act](#) for unreported income of over \$3.5M. The Tax Court of Canada dismissed the appeal on the basis that the taxpayer had not demonstrated that the source of the unreported funds was not taxable (it was claimed that the funds were transfers of an inheritance from Iran).

The TCC judge refused to admit into evidence documents from money exchange enterprises that showed the funds came from Iran, significantly hindering the taxpayer's ability to prove the source of the funds and meet his burden.

ANALYSIS

The Court referred to the Supreme Court of Canada decision in *R v. Blackman*, [2008 SCC 37](#) at para 36, where it was said that the trial judge is well placed to determine the extent to which the hearsay dangers of a particular case are of concern and whether they can be sufficiently alleviated (para 3). The trial judge's ruling on admissibility is entitled to deference as long as it

is informed by the correct principles of law (para 3).

The *Canada Evidence Act*, section 30, provides a statutory hearsay exception for business records (records made in the usual and ordinary course of business). The court may examine the documents and hear evidence as to the circumstances of their creation and draw any reasonable inference (s 30(6) CEA). Simple assertions that the documents are created in the usual and ordinary course of business are insufficient, there must be supporting evidence (para 6). Simple assertions that the documents are created in the usual and ordinary course of business are insufficient, there must be supporting evidence (para 6). In this case, counsel at trial failed to call witnesses from the money exchange enterprises, there was no affidavit evidence, and there was no explanation offered as to the circumstances in which the records were made. The failure of trial counsel bound the hands of the counsel on appeal.

Subsection 30(7) of the CEA also requires that seven days' notice be given of the intention to introduce documents under the business records exception (para 7). The taxpayer argued that the notice requirement was satisfied by producing the documents along with other documents as part of discovery. There is no particular form of notice required, but the notice should "sufficiently describe which documents are to be introduced and indicate an intention to introduce them as business records" (para 7). The Tax Court Judge had discretion to dispense with the notice requirement but did not do so.

The court also held that the documents could not be admitted under the common law business records exception to hearsay rule, as the conditions in *Ares v. Venner*, [1970] S.C.R. 608 were not met at trial, nor could they be admitted under the principled approach as the evidence in required for the trier of fact to adequately address its worth - *R v. Khelawon*, 2006 SCC 57 at paras. 2-3 (para 9).

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