Rebutting the Presumption that Items Mailed are Received the Day Mailed

Rebutting the Presumption that Items Mailed by CRA are Received on the Day Mailed

Conocophillips Canada Resources Corp v MNR, 2013 FC 1192

[see also *Pylatuke v The Queen*, 2013 TCC 364]

At issue was whether the taxpayer received or is continued to be presumed to have received a Notice of Reassessment that was dated almost two (2) years prior to the date the taxpayer states to have received it. Though the decision proper was made on the basis of the poor process of decision making followed by the CRA, it is likely that the taxpayer's good record keeping and communications procedures assisted in the finding.

This was a judicial review application challenging the reasonableness of the Ministers inquiry into the issue of whether the presumption created by ITA subsection 244(14) was rebutted. Thus, the court looked into the decision making process of the Minister prior to issuing its decision in relation to the 244(14) issue, and found it wanting.

The provision in question reads:

> 244(14) Mailing date - For the purposes of this Act, where [...] any notice of assessment or determination is mailed, it **shall be presumed** to be mailed on the date of that notice or notification. [emphasis added]

The taxpayer presented evidence to rebut this presumption, including affidavits as to its normal procedure in dealing with correspondence with CRA, it's record keeping practices, and past practice of the CRA when issuing Notices of Reassessment for the taxpayer.

The court determined that the cross-examination showed that the decision was not made independently. The court stated:

> [26] I find that the main conclusion that arises from the cross-examination is that, in reaching the Decision under review, Mr. Kassan was not sufficiently engaged with the evidence so as to form an independent opinion on the evidence, and, therefore, he placed full reliance on Ms. Tse's opinions on the evidence in rendering the Decision. Of critical importance in the present review is that there is no evidence on the record of how Ms. Tse reached her opinions, what they were, and, indeed, what she said to Mr. Kassan. Thus, I find that there is no transparent and intelligible justification for Mr. Kassan's finding that the Assessment was mailed.

[** This additional information was kindly provided by David Sherman. Tax Lawyer & Author at

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There have been quite a number of cases where the Tax Court has found that an assessment or objection confirmation that the CRA said was mailed was likely not actually mailed. See my Notes to 165(1) in PITA (the below is from the 44th edition; I've modified it for the 45th edition to include the ConocoPhillips case and other new cases):

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An assessment is invalid if it was never mailed (and the onus is on the CRA to show it was mailed if this is raised): Aztec Industries, [1995] 1 C.T.C. 327 (FCA); Sykes, [1998] 1 C.T.C. 2639 (TCC); Massarotto, [2000] G.S.T.C. 19 (TCC); Kovacevic, [2003] G.S.T.C. 112 (FCA); Gray, [2009] 1 C.T.C. 221 (FCA); Giannakouras, [2005] 2 C.T.C. 2457 (TCC); 741290 Ontario Inc., [2008] 4 C.T.C. 2309 (TCC); Barrington Lane Developments, 2010 CarswellNat 2369 (TCC) (CRA's evidence of its mailing procedures was sufficient); Carcone, 2011 CarswellNat 4952 (TCC) (CRA's witness was unable to testify to CRA mailing procedures). (The Crown may need to prove the notice was mailed only if the taxpayer's allegation of not receiving it is "credible": Nicholls, 2011 CarswellNat 82 (TCC, under appeal to FCA), para. 15. Also, once a taxpayer files an application for extension of time they are presumed to have notice of the assessment: Burke, 2012 CarswellNat 4110, para. 27. Filing an objection indicates receipt of the assessment but keeps the right of appeal open: Burke, paras. 35-36.) It is also invalid if it was mailed to an incorrect address: 236130 British Columbia Ltd., [2007] 1 C.T.C. 262 (FCA); Corsi, 2008 CarswellNat 2870 (TCC); Burstein, 2009 CarswellNat 1461 (TCC); Gyimah, [2011] 1 C.T.C. 2493 (TCC); Lambo, 2011 CarswellNat 2230 (TCC); but delivery to the taxpayer's accountant, when the taxpayer had left the country with no forwarding address, was valid in Gebele, [2007] 1 C.T.C. 272 (FCA), and delivery was valid when the taxpayer had deliberately tried to confuse the CRA by providing various addresses: Consultation Next Step Inc., 2009 CarswellNat 2406 (TCC), or when the taxpayer had failed to provide the CRA with his current address: Carvalho, 2007 CarswellNat 5888 (TCC), Newell, [2010] 5 C.T.C. 2383 (TCC) and Austin, 2010 CarswellNat 3056 (TCC); and delivery by registered mail (unclaimed) to an old address was valid in Roy, 2009 CarswellNat 4374 (TCC), where the taxpayer had moved and notified Revenu Québec but not the CRA. See Notes to 171(1) re the TCC having jurisdiction to address this issue; in Burke at paras. 41-43, the TCC agreed that CRA is not entitled to pursue collection of an unmailed assessment that increases tax, but ruled that assessment matching what the taxpayer filed is not a prerequisite to collection. Personal delivery is as good as mailing: Grunwald, [2006] 1 C.T.C. 141 (FCA); leave to appeal denied [2006] G.S.T.C. 44 (SCC). If the Crown can show that it was likely mailed then it is deemed by 248(7) to have been received even if it was never actually received: Bowen, [1991] 2 C.T.C. 266 (FCA); Schafer, [2000] G.S.T.C. 82 (FCA); McLelland, [2004] 5 C.T.C. 109 (FCA); Abraham, [2004] 5 C.T.C. 2149 (TCC); Lai, [2005] 5 C.T.C. 2252 (TCC); Skalbania, [2010] 1 C.T.C. 2509 (TCC). The taxpayer's ability to comprehend the assessment is irrelevant: Gyimah, [2011] 1 C.T.C. 2493 (TCC), para. 39; Jablonski, 2012 CarswellNat 123 (TCC); but at para. 40 of Gyimah, the Court suggested that a return filed by a mentally ill person might be invalid, thus invalidating the resulting assessment even if it was correctly mailed!]

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