Federal Court of Appeal | Cour d'appel fédérale

Date: 20161115

Docket: A-517-15

Citation: 2016 FCA 282

CORAM: **WEBB J.A.**
RENNIE J.A.
DE MONTIGNY J.A.

BETWEEN:

PRUDENTIAL STEEL LTD. and ALGOMA TUBES INC.

Appellants

and

BELL SUPPLY COMPANY

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

Heard at Ottawa, Ontario, on June 7, 2016.

Judgment delivered at Ottawa, Ontario, on November 15, 2016.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RENNIE J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] This is an appeal from the decision of the Federal Court (2015 FC 1243) dismissing the application for judicial review brought by the Appellants. The Appellants were seeking judicial

review of an advance ruling issued by the Canada Border Services Agency (CBSA) to the Respondent on December 9, 2013 that certain seamless casing and tube products would not be subject to anti-dumping and countervailing duties upon importation into Canada.

[2] For the reasons that follow, I would dismiss this appeal.

I. Background

[3] The Appellants had requested protection under the *Special Import Measures Act*, R.S.C. 1985, c. S-15 (*SIMA*) from dumped and subsidized oil country tubular goods (OCTG) originating in or exported from China.

[4] In a finding issued on March 10, 2008 (NQ-2007-001) the Canadian International Trade Tribunal (CITT) found that "the dumping and subsidizing of seamless carbon or alloy steel oil and gas well casing [as described in this finding] originating in or exported from the People's Republic of China … are threatening to cause injury to the domestic industry." This finding was renewed on March 11, 2013 (RR-2012-002).

[5] In another finding issued on March 23, 2010 (NQ-2009-004), the CITT found that certain OCTG (as described in that finding) originating in or exported from China have caused injury. This finding was renewed on March 2, 2015 (RR-2014-003).

[6] As a result of these findings, anti-dumping and countervailing duties were imposed on the goods identified in these findings.

[7] By a letter dated July 29, 2013, the Respondent requested an advance ruling from the CBSA with respect to whether certain seamless casing and tubing products that would originate in China but would undergo certain work in Indonesia, would be subject to the anti-dumping and countervailing duties referred to above when imported into Canada.

[8] After receiving the original request and subsequent submissions on September 12, 2013 and October 11, 2013, the CBSA in a letter dated December 9, 2013, first stated a brief summary of its understanding of the facts and then stated:

> With this understanding, the CBSA has determined that, for purposes of the *Special Import Measures Act*, the specific casing and tubing grades and sizes contained in Bell Supply's advance ruling request of July 29, 2013, and subsequent submissions of September 12, 2013 and October 11, 2013, would be deemed to be seamless casing and tubing products originating in Indonesia and, consequently, would not be subject to anti-dumping duty and countervailing duty upon importation into Canada.

[9] The Appellants sought judicial review of this decision by the CBSA. The Federal Court Judge dismissed the application for judicial review on the basis that the advance ruling is not a decision that is subject to judicial review (Paragraph 38 of her reasons). This conclusion was based on a decision of the Federal Court in *Rothmans, Benson and Hedges Inc. v. Minister of National Revenue* (1998), 148 F.T.R. 3 (*Rothmans*).

[10] The Federal Court Judge noted that her conclusion that the advance ruling is not a decision that is subject to judicial review was sufficient to dispose of the application. However, she also commented on the interplay between the statutory appeal process under *SIMA* and the availability of judicial review of a decision made under that statute.

II. Standard of Review

[11] In this case there has been no decision on the merits of the judicial review application as the Federal Court Judge dismissed the application on a preliminary basis without reviewing the decision that was made by CBSA. As a result, in my view, the standard of review as set out in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 45 to 47 is not applicable in this appeal. Rather, the standards of review that are applicable in this appeal are those standards as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. Findings of fact (including inferences of fact) will stand unless it is established that the Federal Court Judge made a palpable and overriding error. For questions of mixed fact and law, the standard of correctness will apply to any extricable question of law and otherwise the standard of palpable and overriding error will apply. An error is palpable if it is readily apparent and it is overriding if it changes the result.

III. Analysis

[12] The determination by the Federal Court Judge that the advance ruling was not a decision that could be subject to judicial review was based on the decision of the Federal Court in *Rothmans*. In *Rothmans* the company obtained a ruling under the *Excise Act*, R.S.C. 1985, c. E-

14 and the *Excise Tax Act*, R.S.C. 1985, c. E-15 that certain products were "cigarettes" and other products were "tobacco sticks." When *Rothmans* brought an originating notice of motion to quash this ruling, the Minister of National Revenue brought a motion to strike the notice. The Federal Court allowed the motion and the notice was struck on the basis that the ruling was not a decision. In particular, the Federal Court in *Rothmans* stated that:

> 27 The moving party recognizes that, as a matter of policy, the Department will respect an advance tax ruling. However, the Department's advance rulings and technical interpretations have no binding legal effect [*Owen Holdings Ltd. v. The Queen* (1997), D.T.C. 5401 at 5404 (F.C.A.)] and the Department would not be estopped by its ruling [*Woon v. Minister of National Revenue* [1950] 50 D.T.C. 871 at 875 (Ex.); *Rothmans Ltd., et al. v. Minister of National Revenue, et al.* [1976] C.T.C. 332 at 338 (F.C.T.D.)]. A taxpayer must prove that it meets the requirements of the legislation on its own terms; the Minister's tax treatment of its competitors cannot assist it [*Ford Motor Co. of Canada Ltd. v. Minister of National Revenue*, [1997] 212 N.R. 275 at 289].
>
> 28 The advance ruling does not grant or deny a right, nor does it have any legal consequences [*Demirtas v. Canada*, [1993] 1 F.C. 602 and *Singh v. Canada*, (1994), 82 F.T.R., 68 at 71]. It does not have the legal effect of settling the matter or purport to do so. It is at the most a non-binding opinion. Moreover, there is no evidence that any tax has been levied on a product corresponding to the prototype of the product in the advance ruling.
>
> [Footnote reference numbers have been replaced with the decisions referenced in the footnotes.]

[13] Advance rulings are often provided under the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) and the *Excise Tax Act* and are relied upon by taxpayers. The important role that such rulings play was described by Bowman J. (as he then was) in a footnote in *Goldstein v. The Queen*, [1995] T.C.J. No. 170, [1995] 2 C.T.C. 2036 (and repeated in *Sentinel Hill 1999 Master*

Limited Partnership (Designated member of) v. The Queen, 2007 TCC 742, [2007] T.C.J. No. 556):

> 10 I leave aside entirely the question of advance rulings which form so important and necessary a part of the administration of the *Income Tax Act*. These rulings are treated by the Department of National Revenue as binding. So far as I am aware no advance ruling that has been given to a taxpayer and acted upon has ever been repudiated by the Minister as against the taxpayer to whom it was given. The system would fall apart if he ever did so.

[14] There is no provision in either the *Income Tax Act* or the *Excise Tax Act* that advance rulings will be binding on the Minister of National Revenue (Minister). However, the Canada Revenue Agency (CRA) has confirmed that it considers such advance rulings to be binding several times in its circulars and memoranda. This confirmation appears in paragraph 14 of the latest version of Information Circular 70-6R7 dated April 22, 2016 for rulings issued in relation to the *Income Tax Act* and paragraph 16 of the latest version of New Memorandum 1.4 dated April 2015 for rulings issued in relation to the *Excise Tax Act*.

[15] Since the CRA considers such rulings to be binding and since, as noted by Bowman J., the system would fall apart if it did not treat them as binding, cases where there is a dispute between a taxpayer and the CRA (or its predecessors) with respect to whether an advance ruling that had been issued by the CRA (or its predecessors) to that taxpayer is binding on the CRA (or its predecessors) are rare.

[16] One such case is *Woon v. Canada (Minister of National Revenue)*, [1951] Ex. C. R. 18, [1950] C.T.C. 263 (*Woon*), where the Exchequer Court held that the Minister was not bound by a

ruling that had been given by the Commissioner of Taxation. In particular, in paragraph 18, the Exchequer Court quoted the following excerpt from *Phipson on Evidence*, 8th Ed.:

> Estoppels of all kinds, however, are subject to one general rule: they cannot override the law of the land. Thus, where a particular formality is required by statute, no estoppel will cure the defect.

[17] As a result, even though the taxpayer completed the transactions as described in the ruling, the Minister was not estopped from assessing in a manner contrary to the ruling.

[18] In an updated version of the same text (*Phipson on Evidence*, (18th ed., 2013)), after referring to the decision of the House of Lords in *R. (Reprotech (Pebsham) Ltd.) v. East Sussex County Council*, [2002] UKHL 8, [2003] 1 W.L.R. 348, it is stated at page 118 that:

> [on] the one hand, this decision has undoubtedly strengthened the principle that a public body cannot prevent itself from exercising a statutory discretion, or prevent or excuse itself from performing a statutory duty; on the other hand, however, it is obviously unlikely that any further references to the rules of estoppels will be made in this context.

[19] As a result, it appears that the law as stated in *Woon* is still applicable. Whether advance rulings issued under the *Income Tax Act* or the *Excise Tax Act* are binding is not in issue in this appeal. However, it appears that such rulings would not be binding on the Minister who is charged with the duty to assess tax under section 152 of the *Income Tax Act* and the authority to assess tax under section 296 of the *Excise Tax Act*. This statutory duty and statutory discretion that has been granted by Parliament cannot be restricted or modified except by an Act of Parliament.

[20] In this case, the advance ruling provided by the CBSA stated that:

> With this understanding, the CBSA has determined that, for purposes of the *Special Import Measures Act*, the specific casing and tubing grades and sizes contained in Bell Supply's advance ruling request of July 29, 2013, and subsequent submissions of September 12, 2013 and October 11, 2013, would be deemed to be seamless casing and tubing products originating in Indonesia and, consequently, would not be subject to anti-dumping duty and countervailing duty upon importation into Canada.

[21] Simon Duval of the CBSA submitted an affidavit in which he stated that:

> 4. The opinion provided by the CBSA to Bell Supply Company on December 9, 2013 is not binding on it or any importer, and it does not constitute a final decision. The CBSA provides opinions such as that provided to Bell Supply Company on December 9, 2013 only as a courtesy and on a provisional basis. Only when goods have in fact been imported to Canada does the CBSA make a binding determination as to whether they are subject to anti-dumping or countervailing duties. The CBSA will then require further specific information and verification with respect to the goods in coming to its determination.

[22] In the first sentence, when he indicates that the "opinion … is not binding on it", it is not clear whether the word "it" is intended to refer to Bell Supply Company or the CBSA. Since he refers to "it or any importer" this sentence could be interpreted as a statement that the "opinion provided by the CBSA to Bell Supply Company … is not binding on [Bell Supply Company] or any importer." Although he also referred to it as an opinion, on cross examination on his affidavit Mr. Duval confirmed that if the CBSA was satisfied that the information that had been provided by the Respondent was correct and that the Respondent satisfied the conditions set out in the letter, that "there would be no duties collected."

[23] However, even though the advance ruling indicates that a final decision has been made by the CBSA and Mr. Duval indicated that he expected the ruling to be followed by CBSA, this does not make the advance ruling binding on the CBSA any more than advance rulings issued in relation to the *Income Tax Act* and the *Excise Tax Act* would be binding on the Minister.

[24] In this case, the Appellants argue that the advance ruling is binding on the CBSA based on the Memorandum D11-11-1 "National Customs Rulings" issued on October 19, 1998. In this memorandum paragraph 9 states that:

> 9. An NCR is binding on both the Department and the importer as long as all conditions specified in the original request have not changed, subject to any stated qualifications by Revenue Canada, or until the NCR is modified or revoked. It is the responsibility of the importer to advise the Department of any changes to the particulars with respect to an NCR.

[25] In this case there is no live dispute between the Respondent and the CBSA with respect to whether the CBSA is bound by the advance ruling. Assuming, without deciding, that this ruling is a National Customs Rulings, it should be noted that there is no provision of *SIMA* that provides that any advance ruling issued under that statute will be binding. As a result, this statement by the CBSA in its own memorandum is essentially the same as the statements made by the CRA in its published information circular and memorandum that it considers itself to be bound by advance rulings issued in relation to the *Income Tax Act* or the *Excise Tax Act*. Such self-proclaimed declarations by a public agency cannot change the law as reflected in *Phipson on Evidence* and cannot prevent such agency from performing the statutory duty or exercising the statutory discretion that has been bestowed on the agency by Parliament.

[26] Under section 56 of *SIMA*, a determination by a customs officer that certain imported goods would be subject to anti-dumping and countervailing duties is only made after the goods are imported into Canada. Any advance ruling made before such goods are imported would not be binding on such officer as it cannot prevent such officer from exercising the discretion granted by Parliament to make such determination.

[27] The Appellants also argue that they are prejudicially affected by the advance ruling since anti-dumping and countervailing duties are imposed to protect the domestic industry and any decision that such duties would not be imposed on goods that may be imported into Canada would be prejudicial to the domestic industry, if, as a result of a review of that decision, it is found that such duties should be imposed. However, the domestic industry would only be adversely affected if such goods are actually imported. If no such goods are imported, there would be no harm to the domestic industry, even though there is an advance ruling issued by the CBSA that such goods would not be subject to anti-dumping and countervailing duties.

[28] As well, since the advance ruling is not binding on any CBSA officer who may make the determination under section 56 of *SIMA* in relation to any imported goods, the officer could impose anti-dumping and countervailing duties when such goods are imported, notwithstanding the advance ruling. The Appellants would not be prejudiced if the officer did so. Any potential prejudice would only arise if such goods are imported without the imposition of such duties.

[29] As a result, I do not agree with the Appellants that the advance ruling was binding on the CBSA or that the Appellants were prejudicially affected by the issuance of the advance ruling itself.

[30] I would therefore dismiss the appeal, with costs payable by the Appellants to the Respondent.

"Wyman W. Webb"
J.A.

"I agree
Donald J. Rennie J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED NOVEMBER 2, 2015, NO. T-2126-13 (2015 FC 1253)

DOCKET:	A-517-15
STYLE OF CAUSE:	PRUDENTIAL STEEL LTD. and ALGOMA TUBES INC. v. BELL SUPPLY COMPANY and ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
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REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	RENNIE J.A. DE MONTIGNY J.A.
DATED:	NOVEMBER 15, 2016

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