

Federal Court of Appeal



Cour d'appel fédérale

Date: 20141107

**Dockets: A-114-14
A-115-14**

Citation: 2014 FCA 257

**CORAM: TRUDEL J.A.
WEBB J.A.
BOIVIN J.A.**

BETWEEN:

NORMA J. FORD and IAN M. FORD

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on October 7, 2014.

Judgment delivered at Ottawa, Ontario, on November 7, 2014.

REASONS FOR JUDGMENT BY:

WEBB J.A.

CONCURRED IN BY:

**TRUDEL J.A.
BOIVIN J.A.**

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REASONS FOR JUDGMENT

WEBB J.A.

[1] Ian Ford and Norma Ford have each appealed the judgments rendered by the Tax Court of Canada on January 29, 2014 (Tax Court of Canada docket numbers 2012-2351(IT)I and 2012-2353(IT)I). Rossiter A.C.J. had dismissed their appeals from the reassessments issued under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), (the Act) for the 1999, 2000, and 2001 taxation years for Ian Ford, and for the 2000 and 2001 taxation years for Norma Ford. As provided in the

Order of this Court dated March 31, 2014, their appeals were consolidated and Norma Ford represented both appellants in the consolidated appeals.

Background

[2] Ian Ford and Norma Ford participated in an art donation program operated by Canadian Art Advisory Services. They purchased pieces of art for a particular price and then donated the art to a charity. For each donation they received a receipt for an amount that exceeded the amount that they paid for the art.

[3] Ian Ford was reassessed in 2002 in relation to his 1999 taxation year and Ian Ford and Norma Ford were each reassessed in 2003 in relation to their 2000 and 2001 taxation years. They were reassessed on the basis that the fair market value of the art that was donated to the charity or charities (and hence the amount of the gift) was the amount that they paid for the art, not the higher amount as stated on the receipt (or receipts) that they had received from such charity or charities. They were also assessed gross negligence penalties under subsection 163(2) of the Act.

[4] They filed notices of objection and, in 2012, they were further reassessed to remove the penalties that had previously been assessed and to reduce their income by the taxable capital gains that they had reported in their tax returns in relation to the donation of the art to the charity or charities. They then filed notices of appeal to the Tax Court of Canada.

Issues

[5] The issues raised by Ian Ford and Norma Ford can be consolidated and summarized as:

- (a) a procedural fairness issue in relation to the scheduling and conduct of their hearing before the Tax Court of Canada; and
- (b) a statutory interpretation issue related to the requirement in subsection 165 (3) of the Act that the Minister reconsider the assessment with all due dispatch following the receipt of a notice of objection.

[6] There are two parts to their statutory interpretation argument. They submit that the Minister lost the right to reassess them in 2012 because of the long period of time between the date that they served their notices of objection in 2002 – 2003 and the date that the Minister reassessed them in 2012. They also argue that, as a result of this significant delay, they are unable to bring forward evidence to support their valuation of the art, and therefore their appeals should be allowed.

Procedural Fairness Issue

[7] Ian Ford and Norma Ford submit that the Tax Court of Canada did not have the right to set their appeal down to be heard as part of a group of appeals of individuals who had participated in the same program offered by Canadian Art Advisory Services. Their main concern was that it appeared to them that the other individuals would be challenging the fair

market value of the art while they would not be challenging the fair market value of the art but rather challenging the right of the Minister to reassess them in 2012. They were concerned that they would be unable to present their legal arguments if they had to participate in a hearing with a large number of other taxpayers who were pursuing a different basis for challenging the reassessments. However, it seems to me that any court, including the Tax Court of Canada, has the power to control its own process and to set appeals for hearing as it may determine for the efficient and fair hearing of appeals.

[8] At the commencement of the Tax Court of Canada hearing, there were several appellants. As a preliminary matter before any evidence was introduced, the Tax Court Judge ruled on the question of whether the Tax Court of Canada could waive any part of the interest that had accrued as a result of the significant delay on the part of the Minister in reconsidering the assessments. The Tax Court Judge ruled that the Tax Court of Canada does not have jurisdiction to grant any waiver of interest. The reason that the Tax Court of Canada could not waive interest is that under the Act any waiver of interest would have to be done by the Minister as provided in subsection 220(3.1) of the Act, following an application for such relief by the taxpayer. Any decision by the Minister in response to such an application would not be related to the correctness of the assessment and therefore the Tax Court of Canada would also not have the jurisdiction to review any decision of the Minister in relation to the waiver of interest.

[9] Following the ruling by the Tax Court Judge that the Tax Court of Canada could not waive any interest owing under the Act, most of the appellants signed consents to judgment and did not continue with the hearing. The only persons who were scheduled to have their appeals

heard before the Tax Court of Canada and who then continued with their appeals were Albert Milne, Marion Milne, Ian Ford and Norma Ford. Therefore, when the Tax Court Judge began to hear evidence, Ian Ford and Norma Ford represented one-half of the appellants. They were no longer part of a large group of appellants and, therefore, any concerns that they may have had about having to participate with a large group of people, would have been diminished.

[10] Norma Ford was adamant both at the hearing before the Tax Court of Canada and during this appeal, that they would be relying only on a legal argument and would not be (and had no intention of) introducing any evidence. The standard of review for questions of law is correctness (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, paragraph 8). The remedy that Norma Ford was seeking in relation to her procedural fairness argument was to send the matter back to the Tax Court of Canada for a new hearing. Even if there was a breach of a principle of procedural fairness in this case, the matter would not be sent back for a new hearing but rather this court would deal with the question of law since this Court is “free to replace the opinion of the trial judge with its own” on a pure question of law (*Housen v. Nikolaisen*).

[11] In any event, it does not seem to me that there is any basis in this case upon which to conclude that Ian Ford and Norma Ford were prejudiced by scheduling their appeals to be heard with the appeals of the other individuals or by the conduct of the hearing.

Statutory Interpretation – “all due dispatch”

[12] Ian Ford and Norma Ford’s legal argument is based on the reference to “all due dispatch” in subsection 165(3) of the Act:

165(3) On receipt of a notice of objection under this section, the Minister shall, with all due dispatch, reconsider the assessment and vacate, confirm or vary the assessment or reassess, and shall thereupon notify the taxpayer in writing of the Minister's action.

165(3) Sur réception de l'avis d'opposition, le ministre, avec diligence, examine de nouveau la cotisation et l'annule, la ratifie ou la modifie ou établit une nouvelle cotisation. Dès lors, il avise le contribuable de sa décision par écrit.

[13] Their argument is that their appeals should have been allowed because of the significant delay by the Minister of National Revenue in addressing their notices of objection. Ian Ford had filed his notice of objection in 2002 in relation to the reassessment of his 1999 taxation year and both filed notices of objection in 2003 in relation to the reassessments of their 2000 and 2001 taxation years. The decision of the Minister in relation to these notices of objection was not made until 2012, when they were reassessed as noted above. The essence of their argument is that, since the Minister took so long to reconsider the reassessment, the Minister did not do so with "all due dispatch", as required by subsection 165(3) of the Act and, as a result, the Minister lost the right to reassess them in 2012 and these reassessments should be vacated.

[14] There is nothing in the record to indicate that either the Crown or the Tax Court Judge explained to Norma Ford the consequences that would arise if, as Norma Ford was requesting, the 2012 reassessments were to be vacated. It is important, in this case, to review the history of the assessments and reassessments and to review what happens when a reassessment is issued or vacated.

[15] In the Replies that were filed with the Tax Court of Canada, the Crown sets out the history of the assessments and reassessments of Ian Ford and Norma Ford and these are summarized as follows:

1999 Taxation Year (Ian Ford)

Date of (re)assessment	Result of the (re)assessment
June 15, 2000	Original Assessment of his tax return
March 21, 2002	Liability under the Act increased by reducing the credit for charitable gifts and assessing gross negligence penalties
March 16, 2012	Liability under the Act reduced by vacating gross negligence penalties and deleting the reported taxable capital gain related to the donated art

2000 Taxation Year (Ian Ford)

Date of (re)assessment	Result of the (re)assessment
June 14, 2001	Original Assessment of his tax return
September 29, 2003	Liability under the Act increased by reducing the credit for charitable gifts and assessing gross negligence penalties
March 16, 2012	Liability under the Act reduced by vacating gross negligence penalties and deleting the reported taxable capital gain related to the donated art

2001 Taxation Year (Ian Ford)

Date of (re)assessment	Result of the (re)assessment
June 13, 2002	Original Assessment of his tax return
September 29, 2003	Liability under the Act increased by reducing the credit for charitable gifts and assessing gross negligence penalties
March 16, 2012	Liability under the Act reduced by vacating gross negligence penalties and deleting the reported taxable capital gain related to the donated art

2000 Taxation Year (Norma Ford)

Date of (re)assessment	Result of the (re)assessment
May 14, 2001	Original Assessment of her tax return
September 29, 2003	Liability under the Act increased by reducing the credit for charitable gifts and assessing gross negligence penalties
April 27, 2012	Liability under the Act reduced by vacating gross negligence penalties and deleting the reported taxable capital gain related to the donated art

2001 Taxation Year (Norma Ford)

Date of (re)assessment	Result of the (re)assessment
June 13, 2002	Original Assessment of her tax return
September 29, 2003	Liability under the Act increased by reducing the credit for charitable gifts and assessing gross negligence penalties
April 27, 2012	Liability under the Act reduced by vacating gross negligence penalties and deleting the reported taxable capital gain related to the donated art

[16] Each time that Ian Ford and Norma Ford were reassessed in relation to a particular taxation year, such reassessment nullified the previous assessment or reassessment that had been issued in relation to that year (*Transcanada Pipelines Limited v. The Queen*, 2001 FCA 314; 2001 DTC 5625 – leave to appeal dismissed, [2001] S.C.C.A. No. 619). If a reassessment is vacated, then the previous assessment or reassessment for that same taxpayer for that same year is no longer nullified and such immediately preceding assessment or reassessment is reinstated. For example, if the reassessment issued on April 27, 2012 for the 2001 taxation year of Norma Ford were to be vacated, the reassessment issued on September 29, 2003 for the 2001 taxation year of Norma Ford would be restored.

[17] In this case, Norma Ford was arguing that the reassessments issued in 2012 should not have been issued and should be vacated. Her argument related to the failure of the Minister to act with all due dispatch, as provided in subsection 165(3) of the Act, and that such failure should result in the 2012 reassessments being vacated. However, these reassessments *reduced* the tax liability of Norma Ford and Ian Ford by deleting the gross negligence penalties and the taxable capital gain that they had reported in relation to the donation of art. If these reassessments were to be vacated, then the immediately preceding reassessment issued for each year would be restored and their tax liability would be increased, as the charitable donation tax credit would

still be reduced from the amount as originally claimed in their tax returns, but the gross negligence penalties and taxable capital gains related to the donated art would be restored. If, however, the result of vacating a reassessment would be that a person's tax liability would be increased, (because the previous assessment was for a greater amount), the Tax Court of Canada could not grant that remedy in any event (*Anonby v. The Queen*, 2013 TCC 184; 2013 DTC 1154).

[18] Ian Ford and Norma Ford would only be successful if both the reassessments issued in 2012 and the reassessments issued in 2002, for Ian Ford, and 2003, for Ian Ford and Norma Ford, are vacated. Therefore, her argument with respect to the delay of the Minister in reassessing following the filing of their notices of objection would have to apply to the reassessments that had previously been issued in 2002 and 2003.

[19] In *Bolton v. The Queen*, [1996] F.C.J. No. 820, 96 DTC 6413 (FCA), Hugessen J.A., on behalf of the Federal Court of Appeal, stated that:

In the case of *The Queen V. Ginsberg* (Court file A-242-94) decided last week, we held that Parliament did not intend that the Minister's failure to examine a return and assess tax "with all due dispatch", as required by subsection 152(1),... did not deprive him of the statutory power to issue an assessment. The reasoning in that case applies with even greater force here: Parliament clearly did not intend that the Minister's failure to reconsider an assessment with all due dispatch should have the effect of vacating such assessment. If the Minister does not act, the taxpayer's recourse is to appeal pursuant to s. 169:

169. Appeal – Where a taxpayer has served notice of objection to an assessment under section 165, he may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

(a) the Minister has confirmed the assessment or reassessed, or

(b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that he has vacated or confirmed the assessment or reassessed;

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been mailed to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.

(emphasis added)

The underlined text would of course be both unnecessary and nonsensical if the effect of the Minister's failure was already to vacate the assessment.

[20] Therefore, this Court in *Bolton* held that a reassessment that had been previously issued could not be vacated solely because the Minister failed to reconsider the reassessment with all due dispatch, as required by subsection 165(3) of the Act, as the taxpayer has the right to appeal to the Tax Court of Canada if the Minister does not act in response to the notice of objection within 90 days of the taxpayer having served the notice of objection.

[21] In this case, Norma Ford argued that they could not exercise their right to appeal to the Tax Court of Canada because all of the art donation cases were being held in abeyance by the Minister pending the outcome of the case of *Canada v. Nash*, 2005 FCA 386; [2006] 1 C.T.C. 158. However, she did acknowledge that once the *Nash* case was decided by this Court and leave to appeal to the Supreme Court of Canada was denied ([2006] S.C.C.A. No. 20), it was not in their interest to appeal to the Tax Court of Canada under paragraph 169(1)(b) of the Act. In any event, the statutory right of taxpayers to appeal to the Tax Court of Canada, which is granted by paragraph 169(1)(b) of the Act, cannot be taken away by the Canada Revenue Agency.

[22] Norma Ford also argued that there were other cases that held that the Tax Court of Canada could vacate a reassessment if the Minister did not reconsider the reassessment with all due dispatch. The two cases cited by Norma Ford were *Ereiser v. The Queen*, 2013 FCA 20, [2013] F.C.J. No. 102 and *Moledina v. The Queen*, 2007 TCC 354; [2007] T.C.J. No. 286.

[23] In *Ereiser*, Sharlow J.A., writing on behalf of the Court, stated that:

21 Mr. Ereiser is seeking from the Tax Court of Canada an order vacating the reassessments under appeal. That is the appropriate remedy in an income tax appeal for an assessment (including a reassessment) that is found not to be valid, or that is found not to be correct. I use the term valid to describe an assessment made in compliance with the procedural provisions of the *Income Tax Act*, and correct to describe an assessment in which the amount of tax assessed is based on the applicable provisions of the *Income Tax Act*, correctly interpreted and applied to the relevant facts.

22 The procedural provisions of the *Income Tax Act* include those relating to statutory limitation periods. Generally, those provisions deprive the Minister of the legal authority to assess tax after the expiry of a certain period of time - the period defined in the *Income Tax Act* as the "normal reassessment period" - unless a statutory exception applies.

[24] In these paragraphs Sharlow J.A. describes a valid assessment as "an assessment made in compliance with the procedural requirements of the" Act. As she noted, these procedural requirements include those related to statutory limitation periods, which are defined as the normal reassessment period. The normal reassessment period is defined in subsection 152(3.1) of the Act. She was not referring to subsection 165(3) of the Act, which does not use the expression "normal reassessment period". In this case, Ian Ford and Norma Ford will only be successful if the reassessments issued in 2002 and 2003 are vacated. However, these reassessments were issued within the normal reassessment period. Therefore, they would be validly issued assessments / reassessments as contemplated by Sharlow J.A. This case does not support the

position of Ian Ford and Norma Ford that the principle as set out in *Bolton* should not be applied in this case.

[25] In *Moledina*, Bowman, C.J.T.C. (as he then was) stated that:

7 Generally speaking, delay in processing a notice of objection is not a ground for vacating an assessment or, *a fortiori*, for deleting interest. The reason for not granting such relief is not because of a lack of jurisdiction in the Tax Court of Canada -- if there is a legal basis for vacating an assessment it is within the Court's power to do so -- but because delay is in most instances not a legal basis for attacking an assessment because it lies within a taxpayer's own power to bring the delay to an end.

8 Under paragraph 169(1)(b) of the *Act*, if the Minister has not responded to a notice of objection by reassessing or vacating or confirming the assessment, the taxpayer has a right to appeal to the Tax Court of Canada. It is difficult to imagine why a taxpayer would seek or be granted an extraordinary remedy such as mandamus (cf. *The Queen v. Ginsberg*, 96 D.T.C. 6372) or some other form of judicial review where the Minister delays in dealing with an objection when there is a clear right of appeal after 90 days (see *Bolton v. The Queen*, 96 D.T.C. 6413).

(The footnote reference has not been included)

[26] Rather than question *Bolton*, Bowman C.J.T.C. cites the same principle as set out in *Bolton* and specifically references *Bolton*. *Moledina* also does not support the position of Ian Ford and Norma Ford.

Delay – Evidentiary Issue

[27] Norma Ford also argued that the significant delay by the Minister in reconsidering the notices of objection prejudiced their right to obtain evidence to support the amounts that they had claimed as the fair market value of the donated art when they filed their tax returns. They are

concerned that since the years in question are 1999, 2000 and 2001, it would now be too difficult to obtain the appropriate valuations of the art that they no longer own.

[28] There are many cases where fair market value of a particular property will be an issue to be determined in a hearing before the Tax Court of Canada. Since an appeal to the Tax Court of Canada is always in relation to the assessment or reassessment of a prior taxation year, such valuation issues will always relate to an earlier date than the date of the hearing. If taxpayers are concerned that the Minister is not reconsidering their assessment with all due dispatch, as required by subsection 165(3) of the Act, and that the passage of time will have a negative impact on their ability to muster evidence for a hearing before the Tax Court of Canada, then they could avail themselves of the right to appeal to the Tax Court of Canada, as provided in paragraph 169(1)(b) of the Act.

[29] In this case, Ian Ford and Norma Ford would also have known in 2002 when Ian Ford was reassessed, that the Canada Revenue Agency did not agree with the valuation of the art that was used in filing Ian Ford's 1999 income tax return. They filed their notices of objection in 2002 and 2003 and therefore have had several years to collect their evidence in relation to the fair market value of the donated art. Norma Ford's statement that the evidence on valuation was thin and difficult to obtain does not assist her case as this would mean that she would have little or no evidence to present to the Tax Court in support of their position that the fair market value of the donated art was the amount that was claimed as the charitable donation in their tax returns.

Conclusion

[30] I agree with the statement of Hugessen J.A. in *Bolton* that a taxpayer cannot succeed in having a reassessment that had been previously issued vacated, solely because the Minister has failed to reconsider that reassessment with all due dispatch. Since Ian Ford and Norma Ford would only be successful in this appeal if the reassessments that had been validly issued in 2002 and 2003 are vacated (or varied), the principle as set out in *Bolton* is applicable and these assessments issued in 2002 and 2003 cannot be vacated (or varied) solely because the Minister took a number of years to reconsider these reassessments following the serving of their notices of objection.

[31] As a result, I would dismiss the consolidated appeals, with one set of costs. A copy of these reasons shall be placed in appeal A-115-14.

“Wyman W. Webb”

J.A.

“I agree
Johanne Trudel J.A.”

“I agree
Richard Boivin J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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