Citation: 2012 TCC 328
Date: 20120914
Dockets: 2012-293(IT)G
2012-918(IT)G
2012-1357(IT)G
2012-1438(IT)G

BETWEEN:

LAWRENCE WATTS, ELIZABETH BROCCOLI, VINTON MURRAY and ALFRED J.R. ADJETY,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

(Edited from the transcript of Reasons for Judgment delivered orally from the Bench on June 14, 2012 at Toronto, Ontario)

Campbell J.

[1] Let the record show that I am delivering oral reasons respecting motions in four matters: Lawrence Watts, Elizabeth Broccoli, Vinton Murray and Alfred Adjety. I permitted Mr. Watts to speak to these Motions on behalf of all four Appellants, with their permission, as the issues are essentially the same. I did so pursuant to the discretion provided to me in Rule 30 but only in respect to these Motions which are before me.

[2] The Respondent's Motion dated April 30, 2012 was the first to come in. It was re-filed on May 3rd as an Amended Notice of Motion, but as far as I could tell it was only to change the time allotted for the motions in court. Essentially, that motion was to strike the Notices of Appeal as no reasonable grounds were disclosed pursuant to

Rule 53 and alternatively, if the Court did not strike and requested the Appellants to amend the Notices of Appeal, then the Respondent requested time to file Replies to these Notices of Appeal.

[3] On June 5, 2012 I had motions filed by each of the Appellants. Essentially, each was an application pursuant to Rule 58(1)(a) for a determination by the Court of the Appellant's question (and I have summarized it, which I did this morning as follows) which is whether a delay on the part of the Minister of National Revenue (the "Minister") in issuing and sending a Notice of Confirmation is sufficient grounds to vacate an assessment. The Appellants are referring to paragraph 169(1)(b) which states:

> 169. (1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either
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> …
>
> (b) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed. (as read)

[4] In the present Motions, the Appellants allege that more than 90 days have elapsed with no Notices of Confirmation from the Minister being issued and they are therefore asking the Court to vacate the reassessments in respect to each Appellant.

[5] On the day prior to this hearing, I requested that the Respondent provide a written response to the Appellants' motions. Although I did not specifically request that the Crown address the pertinent issue of whether Notices of Confirmation had been issued and sent by the Minister, that is the one piece of information that I was looking for. I did not seek additional submissions from the Appellants in this regard as they were alleging in their Motions that no Notices of Confirmation had in fact been issued by the Minister.

[6] During the hearing this morning, the Respondent submitted Notices of Confirmation for three of the files, Ms. Broccoli's, Mr. Murray's and Mr. Adjety's. None was provided respecting Lawrence Watts, and he advises that it is in excess of two years since he filed his Notice of Objection.

[7] In the Broccoli matter, the Notice of Appeal was filed February 22, 2012 with the Notice of Confirmation being issued on November 30, 2011. In the Adjety

motion, the Notice of Appeal references a date of April 13, 2012 with the Notice of Confirmation being issued February 17, 2012. Finally, in the Murray motion, the Notice of Appeal was filed April 3, 2012 with the Notice of Confirmation being issued on February 17, 2012.

[8] Consequently, all Notices of Appeal in these three matters were filed subsequent to the Minister's Notices of Confirmation having been issued and sent, even though, as Mr. Watts pointed out, the Notices of Confirmation were beyond the 90-day period.

[9] As Respondent Counsel pointed out, section 58(1)(a) engages a two-step process. Step (1) has two elements: An applicant must pose an appropriate question of law or fact or mixed law and fact to the Court. Secondly, the answer to the question must be capable of disposing of all or part of the proceeding, must shorten it or reduce the cost substantially. Step (2): If the Court determines that there is a Rule 58 issue, then a hearing date can be fixed to hear and dispose of that issue.

[10] The Appellants' general question, which is whether the Minister's delay in issuing Notices of Confirmation pursuant to section 169(1)(b), or the non-issuance of the Notice in the Watts matter, can be sufficient grounds for this Court to vacate the assessments, is a legitimate and appropriate Rule 58 question that could be posed to this Court. The question is one of law.

[11] The issuance or non-issuance of a Notice of Confirmation, in considering this aspect in the two-step process, would be irrelevant except that it will impact the ultimate disposition of each of the Appellant's applications. It will not be relevant to the actual answer to the legal question posed and will not invalidate the question that the Appellant poses initially to the Court.

[12] However, we now have a situation where Notices of Confirmation have been issued and sent in three motions, and the Appellants were not prejudiced in filing their Notices of Appeal, which were filed subsequent to those confirmations. Although the confirmations were issued beyond the 90-day period provided in the *Act*, that will have no impact here in light of how the jurisprudence and my own common sense dictate the path that I am now required to take.

[13] Apparently no Notice of Confirmation was issued on the Watts motion, but in accordance with my reasons that follow, the end result will be the same for all Appellants and their Motions. If the Appellants were represented by counsel, my

reasons might follow a different path, but I would be arriving again at essentially the same destination.

[14] A Rule 58 question, whether legitimate or not, is simply premature at this stage of an appeal. I think in most cases, Rule 58 is used either after the pleadings are complete, that is the Notice of Appeal and Reply to the Notice of Appeal have been filed or at some point along the numerous steps a general procedure meanders through prior to a hearing date. I have only Notices of Appeal filed, no Replies, and in fact Respondent Counsel is alleging that the Notices of Appeal that are filed do not conform to the requirements of Rule 48 and Form 21 A.

[15] Although this is not the appropriate time for a Rule 58 question, I am going to address it in light of the Appellants being self-represented. The question posed by each Appellant is an appropriate Rule 58 question for a court to consider. However, even though it is premature, my answer to that question must be in the negative. Consequently, I would refuse to vacate the reassessments as Mr. Watts would have me do.

[16] There is abundant case law from the Federal Court of Appeal that vacating an assessment in the Rule 58 application is an inappropriate remedy for the Minister's undue delay. I am bound by the following case law:

Bolton v Her Majesty the Queen, 96 D.T.C. 6413 at paragraph 3:

> 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):
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> > 152. (1) The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine
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> > (a) the amount of refund, if any, to which the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year, or
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> > (b) the amount of tax, if any, deemed by subsection 119(2), 120(2), 120.1(4), 122.2(1), 127.1(1), 127.2(2), 144(9), 210.2(3) or (4) to have been paid on account of his tax under this Part for the year.] , 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
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> (a) the Minister has confirmed the assessment or reassessed, or
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> (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;
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> 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.

Ginsberg v Her Majesty the Queen, [1996] 3 F.C. 334 at paragraphs 15, 17, 18, 19, 20 and 22:

> **15** In view of the finding of fact of the Tax Court Judge, it is not necessary to decide if the Minister could still assess "at any time" under subsection 152(4) except to say that if the respondent is right in his interpretation of subsections 152(1) and (4), the astonishing result would be that the Minister is not barred by the three-year provision of paragraph 152(4)(b) when the taxpayer has filed a return. Bearing in mind, however, as found by the Tax Court Judge, that the Minister was late in assessing, the only question I must address is the nature of the sanction once there is a failure to exercise a duty under subsection 152(1).
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> **17** I find no escape with the clear terms of subsection 152(3), particularly the words "Liability for the tax under this Part is not affected by . . . the fact that no assessment has been made". (Le fait . . . qu'aucune cotisation n'a été faite n'a pas d'effet sur les responsabilités du contribuable à l'égard de l'impôt prévu par la présente Partie.)
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> **18** Subsection 152(8) in turn says "An assessment shall . . . be deemed to be valid and binding notwithstanding any . . . defect or omission . . . in any proceeding under this Act relating thereto." (une cotisation est réputée être valide et exécutoire nonobstant tou[t] . . . vice de forme ou omission . . . dans toute procédure s'y rattachant en vertu de la présente loi).
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> **19** Section 166, in support, states that "An assessment shall not be vacated . . . by reason only of any . . . omission . . . on the part of any person in the observation of any directory provision of this Act". (Une cotisation ne doit pas être annulée . . . uniquement par suite . . . d'omission . . . de la part de qui que ce soit dans l'observation d'une disposition simplement directrice de la présente loi).
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> **20** This latter provision obliges me to consider whether subsection 152(1) is directory or mandatory.

22 The distinction between a "mandatory" or a "directory" provision is, therefore, not very helpful. If I were to apply the rule of "inconvenient" effects, I would say that there are, no doubt, competing interests between the need to levy revenues for government and public expenditures, the need to have the tax burden shared as equally as possible among the taxpayers, and the need to protect the individual by bringing certainty to his financial affairs at the earliest reasonable possible time. These competing interests have been settled in favour of the government by Parliament with the adoption of subsections 152(3), (8) and section 166.

James v. Minister of National Revenue, 2001 D.T.C. 5075 at paragraphs 12, 15, 17 through 21:

12 The Income Tax Act does not stipulate any consequence for a failure on the part of the Minister to deal with a notice of objection with all due dispatch. On that question, the leading authority in this Court is Bolton v. The Queen, (1996), 200 N.R. 303, 96 D.T.C. 6413, [1996] 3 C.T.C. 3 (F.C.A.). In that case Mr. Justice Hugessen, speaking for the Court, said this (at page 304, N.R.):

> 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 section 169.

15 If Bolton stands, then regardless of the reason for the ten year delay in dealing with the objections, Mr. James cannot obtain the remedy he seeks.

17 In each of those cases it was suggested that the remedy for the Minister's failure to deal with a notice of objection with all due dispatch would be to vacate the reassessment. Bolton was decided after those cases, and deals squarely with the issue of remedy. We see nothing in any of those cases that provides a reason for departing from the principle in Bolton.

18 J. Stollar Construction is the only case in which reassessments were vacated. That is a decision of the Tax Court, and it must be taken as overruled by this Court in Bolton.

19 The comments in Schultz and Appleby on remedy were obiter dicta. It was found in both cases that the Minister had not failed to act with due dispatch, and so the question of the appropriate remedy did not arise. We note as well that the Court in Schultz recognized that a taxpayer who has filed a notice of objection may resort to paragraph 169(1)(b) of the Income Tax Act and appeal directly to the Tax Court.

20 It was argued on behalf of Mr. James that the Bolton interpretation of paragraph 165(3)(b) imposes a statutory duty on the Minister but gives no

> effective weapon to taxpayers by which they can compel the Minister to comply. It is true that under Bolton, a taxpayer cannot claim the right to have a reassessment vacated because it is under objection for an unduly long period of time. However, it does not follow that the taxpayer has no effective remedy. The taxpayer may appeal to the Tax Court under paragraph 169(1)(b), or commence proceedings in the Federal Court to compel the Minister to consider the objection and deal with it. There is jurisprudence relating to such applications in the context of other income tax provisions imposing an obligation on the Minister to act with all due dispatch: Burnet v. Canada, 98 D.T.C. 6205, [1999] 3 C.T.C. 60, [1998] F.C.J. No. 364 (QL) (F.C.A.); Merlis Investments Ltd. v. Canada, [2000] F.C.J. No. 1746 (QL)(F.C.T.D.).
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> **21** We conclude that there is no basis for departing from the decision of this Court in Bolton, and that the Trial Judge was correct to dismiss the motion to set aside or vary the notices of reassessments.

Vert-Dure Plus (1991) Inc. v Her Majesty the Queen, 2007 TCC 379 at paragraph 25:

> [25] Even if Mr. Desrosiers claims the opposite, Vert-Dure's argument is similar to the one he raised when he presented the pre-trial motion to have his own assessment vacated before Angers J. However, this argument was dismissed by the judge in an order rendered December 23, 2003. In *Desrosiers* v. *The Queen*, 2003 TCC 859 (CanLII), 2003 TCC 859, Angers J. stated at paragraphs 14 and 15:
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> > 14 Since *Stollar*, there have been other decisions dealing with the same issue, including *Ginsberg v. Canada*, 1996 CanLII 4062 (FCA), [1996] 3 F.C. 334, in which the Federal Court of Appeal found that a breach of the duty to assess tax with "all due dispatch" does not mean that the assessment will be vacated. The same reasoning applies in this case, even though the provisions of the Act are at issue here. In this case, the Minister had already made an assessment; it is only the Minister's consideration of the objection that must be made with all due dispatch.
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> > 15 Another distinction in this case is that the Appellant has the right to appeal to this Court if 180 days have elapsed after the filing of the Notice of Objection and the Minister has not notified the person that the Minister has vacated or confirmed the assessment or has reassessed. Thus, the Appellant is permitted to advance his case and be heard on the merits without waiting until the Minister has considered the Appellant's Notice of Objection. Finally, application of the provisions set out in section 299 of the Act will preclude the assessment under appeal in this case from being vacated.

[17] These cases make it clear that a taxpayer in such circumstances cannot claim a right to have an assessment vacated. The best remedy that the Appellants can obtain under a Rule 58 question respecting 169(1) is allowing them to proceed to a hearing without the Notices of Confirmation having been issued, in the case of the Watts

matter, or where Notices of Confirmation were in fact issued in the other remaining matters but beyond the 90-day period.

[18] In summary, what all of this boils down to is the following: I am going to allow the four Appellants to proceed to hearing under the General Procedure Rules, whether it is pursuant to my analysis of the Rule 58 question or pursuant to the alternative grounds sought by the Respondent in that motion. The end result will be the same.

[19] Since I agree with the Respondent's submissions respecting the inadequacies of the Notices of Appeal, all of them will require amendments. They address only the issues posed before me today, and I have answered those. Beyond that, they do not contain the material facts which the Appellants rely upon or a statement of the issues. They are not framed within the pertinent rules, and particularly Form 21A, and consequently, the Respondent will be unable to respond to these appeals unless they are amended to conform with those provisions.

[20] In fairness to the Appellants, I am denying the Respondent's Motion to strike the present Notices of Appeal, but pursuant to the Respondent's alternative ground, I am directing that the four Appellants file and serve Amended Notices of Appeal on or before July 27, 2012, setting forth a statement of the issues and the material facts upon which they are relying in their appeals of the reassessments.

[21] The Respondent shall file and serve Replies to the Notices of Appeal on or before September 7, 2012. In fairness to both parties, I have given you each approximately six weeks to do the filing.

[22] I consider success divided here so I am not making any award respecting costs. Finally, I believe these four matters and the Sharma matter, which I disposed of separately, are part of a larger group of appeals which I am case-managing, and if so, they shall form part of any subsequent management procedures applying to the general group.

[23] That concludes my reasons in respect to the motions which I heard earlier today.

Signed at Toronto, Ontario this 14th day of September 2012.

"Diane Campbell"

Campbell J.

CITATION:	2011 TCC 328
COURT FILE NOS.:	2012-293(IT)G 2012-918(IT)G 2012-1357(IT)G 2012-1438(IT)G
STYLE OF CAUSE:	LAWRENCE WATTS, ELIZABETH BROCCOLI, VINTON MURRY and ALFRED J.R. ADJETY AND HER MAJESTY THE QUEEN
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