Docket: 2017-2636(IT)G

BETWEEN:

NICOLINE KLOPPERS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion held by teleconference on
September 17, 2020 at Ottawa, Ontario

Before: The Honourable Justice David E. Graham

Participants:

Counsel for the Appellant:	Jeff D. Pniowsky Matthew Dalloo
Counsel for the Respondent:	John Chapman Jenna Clark

ORDER

The Appellant's motion is denied.

The Respondent is awarded one set of costs in the amount of $350 in this motion and the related motion of Drahoslav Jez (2017-3970(IT)G). The Appellant and Mr. Jez shall be jointly and severally liable for those costs.

The parties shall, on or before December 11, 2020, provide the Court with dates for the completion of the remaining steps in the litigation, including the possible filing of an Amended Notice of Appeal and an Amended Reply.

Signed at Ottawa, Canada, this 29th day of October 2020.

"David E. Graham"

Graham J.

Docket: 2017-3970(IT)G

BETWEEN:

DRAHOSLAV JEZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion held by teleconference on
September 17, 2020 at Ottawa, Ontario

Before: The Honourable Justice David E. Graham

Participants:

Counsel for the Appellant:	Jeff D. Pniowsky Matthew Dalloo
Counsel for the Respondent:	John Chapman Jenna Clark

ORDER

The Appellant's motion is denied.

The Respondent is awarded one set of costs in the amount of $350 in this motion and the related motion of Nicoline Kloppers (2017-2636(IT)G). The Appellant and Ms. Kloppers shall be jointly and severally liable for those costs.

The parties shall, on or before December 11, 2020, provide the Court with dates for the completion of the remaining steps in the litigation, including the possible filing of an Amended Notice of Appeal and an Amended Reply.

Signed at Ottawa, Canada, this 29th day of October 2020.

"David E. Graham"

Graham J.

Citation: 2020 TCC 118
Date: 20201029
Docket: 2017-2636(IT)G

BETWEEN:

NICOLINE KLOPPERS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent;

Docket: 2017-3970(IT)G

AND BETWEEN:

DRAHOSLAV JEZ,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Graham J.

[1] Drahoslav Jez and Nicoline Kloppers (together, the "Appellants") claimed donation tax credits in respect of gifts that they claim to have made through a tax shelter known as the Global Learning Gifting Initiative ("GLGI"). The Minister of National Revenue reassessed both of the Appellants to deny those credits. The Appellants have appealed those denials.

[2] The Appellants seek an order allowing their appeals on the basis of abuse of process. The Appellants also seek an award of solicitor and client costs against the Respondent.

A. Background

[3] There were tens of thousands of other taxpayers who claimed donation tax credits in respect of gifts purportedly made to GLGI. The Crown took two lead cases to trial. The Appellants did not choose to be bound by those lead cases. In a decision reported as *Mariano v. The Queen* ("*Mariano*"),[1] Justice Pizzitelli dismissed the appeals. He found, among other things, that the appellants "did not have the donative intent to make any of their gifts, did not own or transfer the property that is the subject matter of the gift in kind . . .and that the Program was a sham".[2]

[4] There are approximately 17,000 taxpayers who received a GLGI reassessment, objected to that reassessment, did not agree to be bound by the outcome in *Mariano* and have not yet had their objections confirmed by the Minister of National Revenue.[3] I will refer to these objections as the "GLGI Objections" and the reassessments underlying them as the "GLGI Reassessments".

B. Alleged Abuses

[5] The Appellants allege that:[4]

> The Respondent seeks to wrongly curtail the powers of this court to enable the Respondent to abuse its powers under the Income Tax Act (the "Act"), namely:
>
> (a) intentionally violating its obligation to move matters forward in the appeals process with all due dispatch, as required by the Act;
>
> (b) strategically confirming only a small number of [the GLGI Reassessments] with the objective of "dividing and conquering" by utilizing its vast resource advantage against individual taxpayers;

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1 2015 TCC 244.

2 *Mariano* at para. 146.

3 Respondent's Written Submissions dated January 30, 2020, at para. 6.

4 Notice of Motion, para. 12.

> (c) intentionally dragging out the process to wear down individual taxpayers with litigation fatigue and cost concerns so that they drop out rather than exercise their appeal rights granted to them under the Act, while cynically monitoring the drop-out rate.

[6] The Appellants submit that these allegations prove abuse of process and that their appeals should accordingly be allowed. The Appellants' allegations can best be grouped into allegations specifically relating to their appeals and allegations relating to other taxpayers.

C. Allegations Relating to the Appellants' Appeals

[7] The Appellants submit that a number of disingenuous statements made by the Respondent in the Appellants' appeals and the Minister's actions underlying those statements both amount to an abuse of this Court's process. I disagree.

The Minister is confirming the GLGI Reassessments slowly

[8] As set out above, *Mariano* was a lead case. The Minister succeeded in that case on multiple grounds. One would expect that, having succeeded, the Minister would confirm the GLGI Reassessments relatively quickly. This has not, however, been the case. On the contrary, the Minister has been confirming the GLGI Reassessments at a very slow pace.

[9] The Minister confirmed 170 of the GLGI Reassessments between June 25 and September 12, 2019.[5] There is no indication that any additional reassessments were confirmed between September 13, 2019 and January 30, 2020. Therefore, in the space of approximately seven months, the Minister confirmed only 1% of the outstanding GLGI Reassessments. At that rate, the Minister will still be confirming GLGI Reassessments 58 years from now.[6] In written submissions filed on January 30, 2020, the Respondent indicated that the Minister intended "to consider

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5 Respondent's Written Submissions dated January 30, 2020, at para. 20.

6 170 objections in 7 months = 24.28571 objections per month. At that rate, it will take 700 months to deal with all 17,000 objections.

the objections of approximately 300 taxpayers in the coming months."[7] Even if the Minister confirmed 300 GLGI Reassessments every three months, she would still be confirming reassessments 14 years from now.[8]

The Respondent has not been forthright about the Minister's plans

[10] The Respondent initially submitted that the confirmations were occurring at a slow pace because the Minister wanted to issue 170 confirmations and then "use the data collected from this sample of confirmations, including the rate at which taxpayers will appeal to the [Court], in order to develop a plan for considering the remaining notices of objection of this group."[9] This explanation suggested that the initial slow pace of confirmations would eventually be replaced with a faster pace once more information was known.

[11] In a December 2019 conference call, counsel for the Respondent reported that, to that point, 10 of the 170 taxpayers whose GLGI Reassessments had been confirmed had appealed to Court and that three of them were represented. Counsel clarified that the Minister's plan was not to continue to confirm GLGI Reassessments in batches of 170, but rather to assess the appeal rate, assess whether any of the appellants were represented, determine whether there was any element of commonality to the appellants and then formulate a plan to proceed with the balance of the GLGI Objections. Counsel clarified that it was not that the Minister had not decided if she was going to confirm, but rather that she was determining the best way to move forward in light of the large number of appeals involved and the corresponding resources required.[10]

[12] The Respondent's position changed significantly when she filed written submissions on January 30, 2020. She explained that the Minister must carefully consider each objection on its own merits and thus could not advise the Court how

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7 Respondent's Written Submissions dated January 30, 2020, at para. 29.

8 300 objections in 3 months = 100 objections per month. At that rate, it will take 170 months to deal with all 17,000 objections.

9 Letter from the Respondent to the Court dated September 26, 2019.

10 Transcript of the case management conference call held December 17, 2019, at pg. 1, line 28; pg. 2, lines 1-11; pg. 8, lines 3 to 9; and pg. 9, lines 15-22.

many of the GLGI Reassessments would be confirmed.[11] This explanation was difficult to believe.

[13] CRA Appeals is in the business of processing objections. Every objection takes time to process. An objection with regard to an issue that has already been determined by this Court in a test case should be easier to process. There should be economies of scale involved in processing a large number of virtually identical objections.[12] The Minister clearly thought that the GLGI Reassessments arose out of "substantially similar transactions or occurrences or series of transactions or occurrences" or she would not have attempted to bind taxpayers with GLGI Objections through an application under section 174 of the Act.

[14] The Respondent's written submissions included such platitudes as the Minister "is committed to confirming, varying or reassessing all outstanding objections as quickly as is prudent and practicable" and "is actively pursuing options for determining how to most appropriately move forward given the sheer number of outstanding objections and the resources required to conduct individual assessments of each objection."[13] These statements do not actually convey any real information to the Appellants or the Court. They are dripping with bureaucratic-speak that commits to nothing.

[15] The information that the Respondent provided to the Court between June and December 2019 led the Court and the Appellants to believe that the Minister intended to move forward in a meaningful way and that she had a plan to do so. That was clearly not the case.

[16] As set out above, in her January written submissions, the Respondent also reported that the Minister intended to confirm 300 additional GLGI Reassessments "in the coming months."[14] It is difficult to understand why, in the face of data that

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11 Respondent's Written Submissions dated January 30, 2020, at para. 27.

12 I acknowledge that certain taxpayers with GLGI Objections may also be objecting to other issues and that those objections may take more time to process, but the challenges of those objections arise from something other than the GLGI issues.

13 Respondent's Written Submissions dated January 30, 2020, at paras. 28 and 29.

14 Respondent's Written Submissions dated January 30, 2020, at para. 29.

indicated that fewer than 6% of the taxpayers whose reassessments were confirmed would actually appeal to the Court, the Minister would choose to confirm only 300 additional reassessments over a period of months. This is not the level of activity that the Minister had led the Court to believe would be occurring.

[17] It is the Minister's prerogative to process the GLGI Reassessments slowly. I cannot order her to move quickly and I cannot tell her what to do with an objection. Nonetheless, when I ask the Respondent to tell me how the Minister plans to proceed so that I can best determine how to manage the cases currently before the Court and the Appellants can determine how they want to proceed, I expect to receive something more than shifting explanations and platitudes in response.

[18] I put the above concerns to counsel for the Respondent in oral argument. Counsel for the Respondent assured the Court that it was not the Respondent's intention to suggest that there are complicated legal or factual issues that would require the Minister to review each GLGI Objection from the beginning in its entirety. Counsel clarified that the Minister expects that all of the GLGI Objections will be disposed of in accordance with *Mariano*. Counsel explained that processing 17,000 objections will require resources and that the Minister has to allocate resources among competing needs. These explanations are consistent with the explanations previously provided by counsel for the Respondent in the December case management conference. I accept them.

[19] Counsel were unwilling to acknowledge that the Minister was choosing to confirm the GLGI Reassessments at a slow pace. I can understand their reluctance. Such a statement may have implications for the Minister beyond this matter. In any event, I do not need that acknowledgment. It is obvious on its face. The Minister chooses how to allocate her resources. She is currently choosing not to allocate those resources to confirming the GLGI Reassessments. The result is that only a few of them are being confirmed. Whatever the Minister's reasons may be for doing so, the result is the same.

[20] The question remains whether the Respondent's actions in misleading the Court are an abuse of process. While I do not take the Respondent's actions lightly, I do not think that they rise to the level of an abuse of process. They do not violate "the public interest in a fair and just trial process and the proper administration of

justice"[15] or result in unfairness that would bring the administration of justice into disrepute. They did result in a delay in the proceedings, but not one that caused serious prejudice to the Appellants. In my view, the delay occasioned by the Respondent's actions can be adequately dealt with through costs.

[21] In the December 2019 case management conference call, I expressed my concerns about this potential delay to the Respondent. I advised the Appellants that if they wanted to seek costs in respect of the delay, they should do so when they brought their motions. The Appellants did not seek these costs in their motions. I raised the question of costs in respect of the delay with the parties during oral submissions. While counsel for the Appellants agreed that the Appellants should receive such costs, the quantum of costs that he sought and the reasons that he gave indicated that what he was really seeking was an award of costs in respect of the alleged abuse of process rather than in respect of the delay. Counsel indicated that a costs award should be in the hundreds of thousands of dollars. In justifying that figure, he focused on the Respondent's allegedly abusive conduct rather than on any actual costs — such as the costs of attending additional case management conferences or the costs related to additional correspondence sent to the Court — that the delay caused the Appellants. In the end, I felt as if I were almost pushing counsel into asking for the relief. It is not my role to award costs that a party is not seeking.[16] I find that the Appellants are not actually seeking costs in respect of the delay. Accordingly, I will not be awarding any costs in respect of the delay. The Appellants are free to seek these costs from the trial judge who ultimately hears their appeals.

Is confirming slowly to gain a strategic advantage an abuse?

[22] The Appellants' primarily complain that they say the Minister is intentionally confirming the GLGI Reassessments slowly with the goal of dividing and conquering taxpayers. The Appellants would like the Minister to confirm those reassessments quickly so that they can rally other taxpayers to their cause and share the costs of litigation. The Appellants say that limiting the flow of appeals in order to divide and conquer taxpayers is an abuse of the Court's process.

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15 *R. v. Scott*, [1990] 3 SCR 979, at pg. 1007.

16 *Kibalian v. The Queen*, 2019 FCA 160.

[23] I am not convinced that the Minister is confirming the GLGI Reassessments slowly as part of a divide-and-conquer strategy but, even if that were the case, I would not find that her actions were an abuse of process in the Appellants' appeals.

[24] As set out above, *Mariano* has already addressed the GLGI program. Justice Pizzitelli thoroughly reviewed it and found numerous flaws. The Appellants could have agreed to be bound by the outcome in *Mariano*. They could have accepted the settlement offer made by the Minister, an offer that would have left them better off than the outcome in *Mariano*. They chose not to do either of these things. In making that choice, they took the chance that they would end up in exactly the position in which they now find themselves. In reality, they are in the same position in which any taxpayer finds himself or herself before the Court. Like every other taxpayer, they have to finance their own litigation. The potential cost of their litigation is admittedly higher than most appeals, but that cost is higher because they made the choice to participate in a very complex tax shelter and not to involve themselves in the lead case that was defending that tax shelter.

[25] It is not the role of a case management judge to ensure that taxpayers are able to properly fund their litigation by combining resources with other taxpayers. A case management judge's role is to ensure that an appeal proceeds to a trial on the merits in a fair and efficient manner. Sometimes that means grouping taxpayers together under the lead case rules in section 146.1 of the *Tax Court of Canada Rules (General Procedure)*. The Court takes advantage of the rules in order to make the best use of judicial resources and to avoid conflicting decisions. As Justice Pizzitelli stated, "The Court, in controlling its process, is able to utilize this rule to prevent being swamped by potentially thousands of like cases, and the costs and resources applicable thereto, by hearing select cases chosen presumably with a view to having strong precedential value that may hopefully resolve at least the majority of all potential appeals, if not all."[17]

[26] While using the lead case rules may result in taxpayers sharing expenses, that is not the reason that the rules are used. In considering whether to use the lead case rules or how to manage lead cases, the Court may certainly give consideration to the costs involved in a lead case. There is no efficiency gained in moving a lead case forward if the appellant has to abandon it before trial because he or she cannot afford

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[17] *Mariano v. The Queen*, 2016 TCC 161 at para. 53.

to continue. However, this does not mean that a taxpayer has a procedural right to a pool of like-minded taxpayers with whom to share costs, nor does it mean that the failure to provide such a pool is an abuse of the Court's process.

D. Allegations Relating to Other Taxpayers

[27] Other than as set out above, the Appellants are not alleging that the Respondent has taken any steps in their appeals which abuse the Court's process. In the balance of their arguments, the Appellants complain about the conduct of the Minister or the Respondent in respect of different taxpayers with GLGI reassessments.

[28] It is unclear to me whether the Appellants are saying that each of the things that they complain about is in itself an abuse of process or that those things are collectively evidence of an abuse of process. Accordingly, I will examine each concern individually on the basis that the Appellants consider it to have been an abuse of process and then consider all of the concerns collectively.

Failing to confirm the GLGI Reassessments with all due dispatch

[29] Subsection 165(3) of the Act states that, when a taxpayer files a notice of objection to an assessment, the Minister shall, with all due dispatch, reconsider the assessment and vacate, confirm or vary the assessment or reassess. The Appellants submit that, regardless of whether she is doing so to gain an advantage against the Appellants, the simple fact that the Minister is not confirming the GLGI Reassessments with all due dispatch is an abuse of process.

[30] This alleged abuse is an abuse of the objection process not the Court's process. Even if I concluded that the Minister was abusing her own process, the Court does not have jurisdiction to allow an appeal as a result of that abuse.[18]

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[18] *Main Rehabilitation Co. v. The Queen*, 2004 FCA 403 (leave to appeal to the SCC denied 2005 CarswellNat 1110).

[31] The Court also does not have jurisdiction to issue an order of *mandamus* compelling the Minister to confirm a taxpayer's objection.[19] That jurisdiction lies with the Federal Court.[20]

[32] If a taxpayer believes that the Minister is not dealing with his or her objection with all due dispatch, he or she has two choices. If more than 90 days have elapsed since the taxpayer filed that objection and the Minister has neither confirmed that objection nor reassessed, the taxpayer may appeal directly to the Court pursuant to paragraph 169(1)(*b*) of the Act. Alternatively, the taxpayer may seek an order of *mandamus* in the Federal Court compelling the Minister to deal with his or her objection. These are both actions that the taxpayer must take himself or herself. They are actions that taxpayers with GLGI Objections have not taken.[21]

[33] What the Appellants are, in essence, asking me to do is to find that the Minister's lack of action in dealing with other taxpayers, who may or may not want the Minister to act, in a process over which I have no jurisdiction and which takes place entirely outside of the Court's process is, in itself, an abuse of this Court's process in the Appellants' appeals. I will not do so.

[34] If a taxpayer whose objection was not processed with all due dispatch appeals, I cannot allow his or her appeal on the basis of the delay.[22] Similarly, the Minister's conduct during the audit or objection processes in respect of a taxpayer is not grounds upon which I can allow the taxpayer's appeal.[23] If I cannot allow a taxpayer's appeal on the basis of the Minister's delay or conduct in dealing with the

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19 *Markman v. Minister of National Revenue*, 89 DTC 253.

20 *Federal Courts Act*, paragraph 18(1)(a).

21 In *Foroglou v. The Queen*, 2020 TCC 104 at paras. 24 to 28, I set out a number of reasons why a taxpayer might choose not to exercise his or her rights under paragraph 169(1)(*b*).

22 *Bolton v. The Queen*, 1996 CarswellNat 1454 and *Ford v. The Queen*, 2014 FCA 257.

23 *Ereiser v. The Queen*, 2013 FCA 20; *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250; *Addison & Leyen Ltd. v. The Queen*, 2006 FCA 107 (appeal allowed on different grounds 2007 SCC 33); and *Main Rehabilitation Co. v. The Queen*, 2004 FCA 403 (leave to appeal denied 2005 CarswellNat 1110).

taxpayer's own objection, then how could I possibly allow the Appellants' appeals on the basis of the Minister's failure to confirm other taxpayers' GLGI Reassessments?

Bringing the section 174 application

[35] In 2016, the Minister brought an application pursuant to section 174 of the Act (the "Application"). Subsection 174(1) allows the Minister to apply to the Court for a determination of a question if the Minister is of the opinion that the question is common to assessments in respect of two or more taxpayers arising out of substantially similar transactions. Pursuant to subsection 174(2), an application under subsection 174(1) shall set out, among other things, the question in respect of which the Minister requests a determination and the names of the taxpayers that the Minister seeks to have bound by that determination. The Application named certain taxpayers who had already appealed to the Court. It also sought to include all of the taxpayers with GLGI Objections.

[36] The Appellants submit that, by including the taxpayers with GLGI Objections in the Application, the Minister accepted that the Court had jurisdiction to deal with those taxpayers. I agree, but not in the sense that the Appellants would like.

[37] An application under section 174 is a proceeding in this Court.[24] There is no question that the Court had jurisdiction to deal with any taxpayer named in the Application, but that jurisdiction was limited to the Application itself. The Court did not indirectly gain jurisdiction over those taxpayers' objections or the Minister's processing of those objections.

[38] The Appellants also submit that the Minister brought the Application in bad faith. In a recent decision regarding awards of costs in respect of the Application, I concluded that the Minister's decision to bring the Application was based on a mistaken understanding of section 174.[25] There is nothing in the actions of the Minister in either bringing or discontinuing the Application that points to an abuse of the Court's process.

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24 *Tax Court of Canada Act*, subsection 12(3).

25 *Minister of National Revenue v. McMahon*, 2020 TCC 104, at paras. 42-45 and 49.

[39] Overall, I find nothing about the Application that would support a finding of abuse of process in the Appellants' appeals.

Interest relief

[40] The Minister recently advised the Appellants that she would be waiving any interest that accrued during the period of time between the filing of the Application and its withdrawal. The Appellants note that the Minister did not make this offer to taxpayers with GLGI Objections. This is hardly surprising, as those taxpayers did not have appeals that were held in abeyance during the Application.

[41] The Appellants submit that the Minister is making what the Appellants view as selective waivers of interest in order to encourage taxpayers such as the Appellants, who are more advanced in the litigation process, to discontinue their appeals. This is pure speculation on the Appellants' part. In any event, a waiver of interest that could potentially encourage the Appellants to discontinue their appeals could hardly be said to be an abuse of process in those appeals.

Pursuing taxpayers who agreed or purportedly agreed to be bound

[42] Many taxpayers agreed to be bound by the outcome in *Mariano*. Following the decision in *Mariano*, the Minister confirmed the GLGI Reassessments of those taxpayers. Some of those taxpayers took the position that they were not bound by their agreements to be bound. They appealed their confirmations to this Court. The Respondent brought a motion to quash the appeals of some of that group of taxpayers. In a decision called *Abdalla v. The Queen*, the motion was granted and the appeals were quashed.[26]

[43] The Appellants' counsel attempted to have some of their clients added as parties to the *Abdalla* motion. The Respondent opposed their doing so. The Appellants see this as an abuse of process in their appeals. I disagree.

[44] At best, the complaint raised by the Appellants is that the Respondent proceeded against a number of unrepresented taxpayers in *Abdalla* instead of against

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[26] 2017 TCC 222, upheld 2019 FCA 5, leave to appeal to the SCC denied 2019 CarswellNat 2472.

the arguably similarly situated taxpayers represented by the Appellants' counsel so that the Respondent could achieve an easy win and set a precedent. I do not see how this could amount to an abuse of the Court's process in the Appellants' appeals. The Appellants did not sign agreements to be bound by the outcome in *Mariano*. They were not parties to the *Abdalla* motion nor are they parties to similar motions to quash brought by the Respondent against a number of other taxpayers represented by the Appellants' counsel. These motions have nothing to do with their appeals.[27]

Bankruptcy proceedings

[45] Certain taxpayers with GLGI Objections have declared bankruptcy. The Appellants see this as evidence of the Minister's goal to win through attrition. I see it as evidence that those taxpayers were bankrupt. The Minister did not force them to declare bankruptcy any more than she forced them to take part in the GLGI tax shelter.

[46] The Appellants also submit that, in those bankruptcy proceedings, the Minister has taken the position that the debts arising from the GLGI Reassessments are not contingent but rather are to be treated as if the Minister has confirmed the reassessments. The Appellants see this as an abuse of process.

[47] The Tax Court has no jurisdiction over bankruptcy proceedings. That jurisdiction lies with the superior courts of the provinces.[28] While the Minister taking part as a creditor in bankruptcy proceedings initiated by a taxpayer and taking the position that the taxpayer's GLGI Reassessment is accurate hardly seems to be abusive, even if it were, it would not be an abuse of this Court's process let alone an abuse of process in the Appellants' appeals.

Application of refunds

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27 When the motions in respect of the other taxpayers are heard, those taxpayers will be free to seek costs in respect of any delay or prejudice that they believe has been caused by the Respondent's actions in *Abdalla*. This has nothing to do with the Appellants.

28 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 183.

[48] The Appellants submit that the Minister's application of refunds and social benefits to the outstanding debts of taxpayers with GLGI Objections is further evidence of abuse of process. The Court has no jurisdiction over collection actions taken by the Minister. That jurisdiction lies with the Federal Court.[29] The application of the refunds and benefits in question has presumably occurred pursuant to the Minister's powers under subsection 164(2). I cannot see how these actions would be an abuse of the Court's process let alone an abuse of process in the Appellants' appeals. The Minister is taking collection actions against other taxpayers who are not before the Court.

New issues

[49] In *Sweetman v. The Queen*,[30] I granted the Respondent's motion for security for costs against a non-resident taxpayer with a GLGI appeal. One of the factors that I considered in reaching that decision was Mr. Sweetman's likelihood of success. I concluded that the Respondent had a high likelihood of success, as Mr. Sweetman had not provided me with any basis upon which I could conclude that the outcome of his appeal would differ from *Mariano*.[31]

[50] The Appellants submit that the Respondent abused this Court's process by not making Mr. Sweetman or me aware of arguments that the Appellants intend to make in their appeals. The Appellants say that these arguments involve new issues that were not canvassed in *Mariano*. The Appellants similarly submit that the Respondent abused this Court's process by not making other unrepresented taxpayers whose appeals have been heard by this Court since *Mariano* aware of these new issues.

[51] The Appellants are, in essence, taking the position that the Respondent abuses the Court's process if she fails to help taxpayers build their cases. I disagree. The Respondent does not have a duty to inform a taxpayer (self-represented or not) of new issues that may be raised by other taxpayers. Similarly, the Respondent does not have a duty to inform the Court of such issues.

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29 *Johnson v. Minister of National Revenue*, 2015 FCA 51.

30 2020 TCC 36.

31 *Sweetman*, at para. 9.

[52] Even if I had been aware of these new issues, I would not have considered them when determining the likelihood of Mr. Sweetman's success. The Appellants' counsel do not represent Mr. Sweetman.[32] The decision in Mr. Sweetman's appeal will be based on the arguments that he makes, not the arguments the Appellants intend to make. Similarly, I would not have expected the trial judges in the GLGI appeals decided since *Mariano* to have given any consideration to issues not raised by the appellants who appeared before them.

[53] Ultimately, even if the Respondent had the duty that the Appellants' claim, I cannot see how the Respondent's actions in *Sweetman* or in any appeal decided since *Mariano* could in any way represent an abuse of process in the Appellants' appeals.

[54] I would like to point out that the Appellants' Notices of Appeal make no discernable reference to the new issues that they say were not canvassed in *Mariano*. The Appellants appear to simply assume that the Respondent knows that the Appellants will be raising issues the same as or similar to those raised by the Appellants' counsel acting on behalf of a different taxpayer in an application to intervene in an appeal of yet another taxpayer to the Supreme Court of Canada in respect of a different donation scheme.[33] If the Appellants intend to rely on issues other than those identified in their Notices of Appeal, they need to amend their pleadings.

E. Overall Abuse

[55] Having concluded that none of the individual actions that the Appellants complain of give rise to an abuse of this Court's process, I must now consider whether the actions, taken as a whole, demonstrate such an abuse.

[56] The Appellants submit that these actions collectively show that the Minister and the Respondent have been acting in bad faith with the goal of eliminating

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32 The counsel referred to in para. 17 of *Sweetman* is different counsel.

33 The Appellants' written submissions dated September 21, 2020 make reference to a taxpayer named Shirley Alexander who tried to intervene in *Markou et al. v. The Queen*, 2020 CarswellNat 1486 (an application seeking leave to appeal 2019 FCA 299).

taxpayers' appeals through attrition and a divide-and-conquer approach to litigation. The Appellants say that:

a) the Minister is confirming GLGI Reassessments at a slow pace in order to force taxpayers to stand alone;

b) the Respondent mischaracterized the reason that the Minister is confirming GLGI Reassessments at a slow pace because the Respondent wanted to hide the Minister's true plans;

c) the Minister brought the Application to deprive taxpayers with GLGI Objections of their right to litigate their claims;

d) the Respondent tried to keep unrepresented taxpayers who had agreed to be bound by Mariano from having the benefit of arguments made by the Appellants' counsel so that their arguments would fail and their appeals would be quashed;

e) the Minister is forcing taxpayers into bankruptcy to keep them from litigating their claims;

f) the Minister is abusing the taxpayer relief provisions with the goal of taking out the strongest appeals; and

g) the Respondent is hiding winning arguments from unrepresented taxpayers and the Court.

[57] The Appellants argue that, in the circumstances, these actions of the Minister and the Respondent are collectively an abuse of this Court's process.

[58] The Appellants come to this conclusion through a process of circular reasoning. They start from the premise that the Minister and the Respondent are acting in bad faith. They do not consider other possible explanations for actions taken by the Minister and the Respondent. This leads the Appellants to the inevitable conclusion that a given action was taken in bad faith. This, in turn, affirms the Appellants' belief that the Minister and the Respondent are acting in bad faith. That affirmation darkens the lens through which the next action is viewed and the process spirals onwards until there is, in the Appellants' view, overwhelming evidence that

the Minister and the Respondent are abusing the Court's process through their bad faith actions.

[59] The Appellants' absurd suggestion that the Minister is confirming the GLGI Objections slowly in the hope that taxpayers will die before their objections are resolved demonstrates just how far the Appellants have been drawn into their own circular reasoning.

[60] I do not accept this circular reasoning. If, instead of starting from the assumption that the Minister and the Respondent are acting in bad faith, I start with an open mind, it is difficult to conclude that the various actions that the Appellants complain of collectively amount to anything. In each case, there is one or more plausible explanation for the action which involves the Minister and the Respondent acting in good faith.

[61] Even if I accepted the Appellants' circular reasoning, I still do not see how the actions that they complain of collectively abuse this Court's process. The Appellants appear to believe that if they point to enough alleged abuses I will find that an abuse of process must exist in their appeals even if all but one of the alleged abuses have nothing to do with this Court's process or the Appellants' appeals. They are wrong. I have considered the alleged abuses that actually relate to the Appellants' appeals and have concluded that there is no abuse of process. Piling on a collection of other alleged abuses changes nothing.

F. Conclusion

[62] In light of all of the foregoing, the Appellants' motions for their appeals to be allowed for abuse of process are denied.

G. Power to Allow Appeals for Abuse of Process

[63] Had I found an abuse of process, the Appellants wanted me to allow their appeals. Given my conclusion above, it is not necessary for me to determine whether this Court has the power to allow an appeal if the Court finds that the Respondent has abused its process. I expressly decline to consider this issue.

H. Costs of the Motion

[64] Costs of the Appellants' motions are awarded to the Respondent. The Respondent seeks costs in accordance with the Tariff for a Class A appeal. That appears reasonable in the circumstances. The issues in the motion were neither complex nor novel. Both parties conducted themselves in an efficient manner. One set of costs of $350 is awarded to the Respondent, payable forthwith. The Appellants are jointly and severally liable for those costs.

I. Next Steps

[65] Considering all of the foregoing, I see no reason why the Appellants' appeals should not now proceed. The parties are each ordered to provide the Court with dates for the completion of the remaining steps in their respective litigation on or before December 11, 2020.

[66] The Appellants have indicated that they intend to raise new issues. As noted above, those issues do not appear to have been pled in the Appellants' Notices of Appeal. If the Appellants want to file Amended Notices of Appeal, then, when the parties provide the above dates to the Court, the parties should include appropriate deadlines for the service and filing of Amended Notices of Appeal and Amended Replies.

Signed at Ottawa, Canada, this 29th day of October 2020.

"David E. Graham"

Graham J.

CITATION:	2020 TCC 118
COURT FILE NOS.:	2017-2636(IT)G 2017-3970(IT)G
STYLES OF CAUSE:	NICOLINE KLOPPERS v. THE QUEEN DRAHOSLAV JEZ v. THE QUEEN
DATE OF HEARING:	Motion held by teleconference on September 17, 2020
REASONS FOR ORDER BY:	The Honourable Justice David E. Graham
DATE OF ORDER:	October 29, 2020

PARTICIPANTS:

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Counsel for the Respondent:	John Chapman Jenna Clark

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