

Federal Court



Cour fédérale

**Date: 20200417**

**Docket: T-425-20**

**Citation: 2020 FC 532**

**Ottawa, Ontario, April 17, 2020**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**IRIS TECHNOLOGIES INC.**

**Applicant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**ORDER AND REASONS**

[1] Iris Technologies Inc. (the “Applicant”) seeks the refund of \$62.3 million, being a portion of monies remitted to the Minister of National Revenue (the “Respondent”) as GST/HST pursuant to the *Excise Tax Act*, R.S.C., 1985, c. E-15 (the “Act”), for the periods September 1, 2019 and ending on February 29, 2020.

[2] By an Application for Judicial Review filed on March 27, 2020, the Applicant seeks the following relief:

1. an order directing the Respondent to assess its GST/HST returns for the periods starting September 1, 2019 and ending February 29, 2020,
2. an order directing the Respondent to pay its net tax refunds for the periods starting September 1, 2019 and ending February 29, 2020 and any subsequent refunds for following periods until the conclusion of the Respondent's audit; and
3. costs.

[3] On March 30, 2020, the Applicant filed a Notice of Motion (the "Applicant's Motion"), on an urgent basis, seeking the following relief:

1. An interim order requiring the Respondent to release \$62,300,000 of GST/HST refunds and refunds for periods filed subsequent to the date hereof to the Applicant, pending the hearing of the application for judicial review;
2. An order treating as confidential the contents of and the exhibits to the affidavits filed herein; and
3. Costs of this motion.

[4] Prior to the hearing of its Motion, the Applicant withdrew its request for a Confidentiality Order.

[5] The Applicant is a Canadian telecommunications company, providing telecommunications services to residential, commercial, and wholesale customers in Canada and abroad, including the United States of America.

[6] The Respondent is responsible for collecting tax revenues on behalf of the Government of Canada.

[7] The context for the Applicant's Motion is an audit of the Applicant's GST/HST returns undertaken by the Canada Revenue Agency ("CRA") on behalf of the Respondent.

[8] The first audit of the Applicant's GST/HST returns started in December 2018, covering the period of January 1, 2017 to December 31, 2018 (the "First Audit"). The CRA completed the First Audit on October 28, 2019, and no adjustments were made to the GST/HST returns.

[9] During the First Audit, the CRA withheld the Applicant's GST/HST refunds for the periods following December 31, 2018. Following a request by the Applicant's Chief Executive Officer in April 2019, the Respondent agreed to release GST/HST refunds for the periods ending November 30, 2018, December 31, 2018, January 31, 2019, February 28, 2019, and March 31, 2019 during the First Audit because of the financial hardship of the Applicant.

[10] On October 30, 2019, the CRA notified the Applicant that its GST/HST returns for the period ending September 30, 2019 would be audited (the "Audit").

[11] On December 3, 2019, the CRA informed the Applicant by letter that the timeline of the Audit was extended to include all periods between January 1, 2019 and October 31, 2019.

[12] In support of its Motion, the Applicant filed the affidavits of Mr. Samer Bishay and Mr. Magdi Wanis. The Respondent filed the affidavits of Mr. Vance Smith and Ms. Krystina Lau.

[13] Mr. Bishay is the founder and Chief Executive Officer of the Applicant. In his affidavits, Mr. Bishay provided a summary of the Applicant's business activities and customers. He also outlined the timeline of the audit and the Applicant's compliance with all requests for information.

[14] Mr. Bishay deposed that the Respondent has withheld GST/HST refunds owed to the Applicant since September 2019 and that this has caused financial hardship. He described his communications with the Respondent, and his multiple requests for information and relief from the financial hardship.

[15] Mr. Bishay further deposed that during the First Audit the Respondent released withheld GST/HST refunds because of the Applicant's financial hardship. He deposed that he requested the same relief during the Audit, on February 24, 2020, February 27, 2020 and March 19, 2020. He emphasised that the need for funds is heightened during the COVID-19 health crisis in Canada, in light of its serious impact upon commercial activities.

[16] Mr. Bishay also testified that the Applicant's business may fail without access to funds to sustain its continued operations.

[17] Mr. Wanis is the Chief Financial Officer of the Applicant. His affidavit included, as exhibits, the Applicant's GST/HST returns, and business records outlining invoices and payments to suppliers. He also outlined the Applicant's current financial status, the impact that status has on its business activities, and steps taken to secure alternate financing.

[18] Mr. Smith is the Manager of the Aggressive GST/HST Planning Program in the GST/HST Directorate of the Compliance Programs Branch of the Canada Revenue Agency ("CRA").

[19] Mr. Smith deposed that, in his opinion, the GST/HST returns filed by the Applicant suggest participation in a "carousel scheme." He clarified that a "carousel scheme" profits because GST/HST net tax refunds are collected on one end and the GST/HST is not remitted on the other.

[20] Mr. Smith explained that under the Act, if a business buys taxable supplies from suppliers to conduct taxable business, it can recover the GST/HST it paid to the suppliers, called an Input Tax Credit ("ITC"). If a business pays more GST/HST than it collects, it is eligible for a net tax refund. The refund is equivalent to the difference between the GST/HST paid and collected.

[21] Ms. Lau is a Legal Assistant at the Department of Justice. Her affidavit refers to *Personal Property Security Act* ("PPSA") searches conducted in the name of the Applicant. The PPSA searches indicate that the Applicant owns several vehicles and an airplane. Details of those

searches are set out in an email from a title searching company; a copy of the email is attached as an exhibit to this affidavit.

[22] Mr. Bishay, Mr. Wanis and Mr. Smith were cross-examined upon their affidavits. Mr. Bishay was cross-examined on Tuesday, April 7, 2020 between 10:15AM and 12:44PM. Mr. Wanis was cross-examined in the afternoon of April 7, 2020, between 2:06 PM and 5:39PM. Mr. Smith was cross-examined on Wednesday, April 8, 2020 between 10:00 AM and 2:42 PM.

[23] On April 9, 2020, the Respondent issued Notices of Reassessment for the months January 2019 to August 2019. He issued Notices of Assessments for the months September 2019 to November 2019, that is three of the six months for which the Applicant seeks the refund of its GST/HST payments. Gross negligence penalties and interest were imposed in these Notices of Reassessment and Assessment.

[24] On April 10, 2020, the Respondent filed a Notice of Motion, seeking to dismiss the Applicant's Motion on grounds of mootness (the "Respondent's Motion").

[25] In his Notice of Motion, the Respondent seeks the following relief:

1. this Court's leave, pursuant to rule 84(2) of the *Federal Courts Rules*, to file the Supplementary Affidavit of Vance Smith affirmed April 9, 2020 which attached Notices of (Re)Assessment issued in respect of the applicant's monthly reporting periods between January 1, 2019 and November 30, 2019, in the matter of the applicant's motion for an interim order pursuant to section 18.2 of the *Federal Courts Act*; and
2. an Order dismissing the Applicant's motion and application for judicial review on the ground that the issue is now moot.

3. In the alternative, the respondent makes a motion for leave pursuant to rule 84(2) of the *Federal Courts Rules* to file the Additional Affidavit of Paul Stesco which addresses a conversation he participated in with members of the CRTC in the applicant's motion for an interim order pursuant to section 18.2 of the *Federal Courts Act*.

[26] The Respondent tendered two affidavits in support of his Motion, that is another affidavit from Mr. Smith, dated April 9, 2020 and an affidavit from Mr. Paul Stesco, dated April 10, 2020.

[27] In his further affidavit, Mr. Smith deposed that the Respondent had issued reassessments and assessments for the periods of January 2019 to August 2019 and September 2019 to November 2019, respectively. He attached a copy of these reassessments and assessments as an exhibit to his affidavit.

[28] The Applicant objected to the filing of the affidavit of Mr. Stesco and pursuant to the discretion afforded by Rule 84(2) of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), the affidavit of Mr. Stesco was not filed.

[29] Although Counsel for the Applicant initially intended to cross-examine Mr. Smith upon his second affidavit and leave was given to do so at the beginning of the hearing, Counsel subsequently advised that she would not cross-examine Mr. Smith upon his second affidavit.

[30] Counsel were invited to make submissions about the order in which the two Motions would be heard. I agreed with the position advanced by Counsel for the Applicant, that the Applicant's Motion was filed first in time and should proceed first.

[31] As outlined above, the Applicant's Motion for relief was heard prior to the Respondent's Motion. It is appropriate to address the Respondent's Motion first, at this stage.

[32] The Respondent relies on the fact that the GST/HST returns for the period September 2019 to November 2019 have now been assessed to argue that the Applicant's Motion for relief, relative to those returns, is now moot. He also submits that the Applicant's Application for Judicial Review is moot.

[33] The Respondent also relies on the fact that Notices of Reassessment were issued for the period January 2019 to August 2019 to argue that there are no monies available to the credit of the Applicant, in light of the imposition of gross negligence penalties and interest, and that the Applicant owes money.

[34] Citing the decision in *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, [2014] 2 F.C.R. 557 (F.C.A), the Respondent argues that alternate remedies are available to the Applicant, that is pursuant to the *Tax Court of Canada Act*, R.S.C., 1985, c. T-2, to challenge the Notices of Reassessment and Assessment, as well as the gross negligence penalties and interest.

[35] The Applicant likewise relies on that decision to argue that the Federal Court can craft fact specific remedies, including issuing an order of *mandamus* to compel the Respondent to exercise powers under the Act.



[36] The Respondent also argues that section 318 of the Act allows him to set off monies owing to a GST registrant, like the Applicant, against monies owing. Section 318 of the Act provides as follows:

**Recovery by deduction or set-off**

**318** Where a person is indebted to Her Majesty in right of Canada under this Part, the Minister may require the retention by way of deduction or set-off of such amount as the Minister may specify out of any amount that may be or become payable to that person by Her Majesty in right of Canada

**Recouvrement par voie de déduction ou de compensation**

**318** Le ministre peut exiger la retenue par voie de déduction ou de compensation du montant qu'il précise sur toute somme qui est payable par Sa Majesté du chef du Canada, ou qui peut le devenir, à la personne contre qui elle détient une créance en vertu de la présente partie.

[37] The seminal test for mootness is found in the decision of *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. In that case, Justice Sopinka wrote at page 353:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become

academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. ... In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[38] I agree with the Applicant that a "concrete dispute" remains between the parties. The Respondent has assessed the returns for September, October and November 2019. He has not yet assessed the returns for December 2019, January 2020 or February 2020.

[39] In the circumstances, the positive of exercise of discretion to hear the Motion is appropriate.

[40] The Motion has been argued, affidavits were filed, cross-examinations were conducted, and written representations were filed.

[41] I note that section 318 of the Act confers a discretion on the Respondent, not a mandatory duty. In other words, he has a choice about applying monies that are otherwise available to the credit of the Applicant, to any tax debt.

[42] The Applicant submits that this Court can exercise its supervisory jurisdiction, by means of judicial review, notwithstanding the jurisdiction of the Tax Court of Canada to deal with challenges to assessments and the like.

[43] The Applicant refers to the decision in *Chrysler Canada Inc. v. Canada*, 2008 FC 727 at paragraph 24, as to the jurisdiction of this Court to control abuse of process. That paragraph provides as follows:

[24] It is to be noted from these passages that the Supreme Court of Canada left open the door for judicial review of a discretionary decision of the Minister in certain circumstances. The Federal Court is not precluded from hearing judicial review applications in relation to discretionary decisions to issue assessments under the ITA. Nor is the Federal Court without jurisdiction in tax cases to grant fact-specific remedies such as those requested in this Application. The only limitation placed on the Federal Court's jurisdiction to hear a judicial review application is that it is not available if the matter is otherwise appealable. Even so, judicial review is available to control an abuse of power. This approach to judicial review not only preserves the integrity and efficiency of the system of tax assessments and the exclusive jurisdiction of the Tax Court to deal with those matters, but also avoids unnecessary and incidental litigation.

[44] For the foregoing reasons, I am satisfied that the Applicant's Motion is not moot and the Respondent's Motion is dismissed.

[45] It is not necessary for me to address the mootness of the underlying Application for Judicial Review at this time.

[46] I now turn to the Applicant's Motion.

[47] The Applicant seeks relief on two fronts, that is an order that the Respondent assess its GST/HST returns and second, that pending completion of the assessments, the GST/HST monies be refunded so that it may continue operating.

[48] The Applicant bases its request for interim relief on section 18.2 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 which provides as follows:

**Interim Orders**

**18.2** On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

**Mesures provisoires**

**18.2** La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

[49] The test for such relief is addressed in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 31, that is submission of a serious issue for trial; that the applicant will suffer irreparable harm that is not compensable in damages if the relief sought is denied prior to determination of the underlying application; and that the balance of convenience favours the applicant. This test is tri-partite and conjunctive.

[50] Recently, the Supreme Court of Canada modified the criteria for “serious issue” in its decision in *Canadian Broadcasting Corp., supra*. The Respondent submits that because the relief sought is in the nature of a mandatory injunction, the Applicant must show that it has a strong *prima facie* case, and not merely that there is an issue for trial that is neither frivolous nor vexatious.

[51] In assessing the strong *prima facie* case, the Court is to consider the likelihood of the Applicant's success in its underlying application for judicial review.

[52] The serious issue in the Applicant's Motion is to be assessed relative to its underlying Application for Judicial Review, in which it seeks an order of *mandamus*.

[53] The test for granting an order of *mandamus* was set out by the Federal Court of Appeal in its decision in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742. The following requirements must be met for the Court to issue a writ of *mandamus*:

1. There must be a public legal duty to act
2. The duty must be owed to the Applicant
3. There is a clear right to performance of the duty
  - a. the applicant must satisfy all conditions precedent giving rise to that duty
  - b. there was a prior demand for performance of that duty, reasonable time to comply with that request, and a subsequent refusal that was either express or implied.
4. No other adequate remedy is available
5. The order will have some practical value or effect
6. There is no equitable bar to the relief
7. The balance of convenience favours the *mandamus*
8. Where the duty sought to be enforced is discretionary, consideration must be given to the nature and manner of exercise of the discretion.

[54] On the basis of the material submitted, I am not satisfied that the Applicant has met the elevated test for a "serious issue" when the above requirements for a successful *mandamus* application are considered.

[55] As of the date the Applicant's Motion was heard, the evidence showed that the GST/HST returns for the months of December 2019, January 2020 and February 2020 were not assessed.

[56] The Respondent is under a legal duty to assess these returns. That duty is imposed by subsection 229(1) of the Act. The Respondent is entitled to a reasonable time within which to assess these returns. In my opinion, an application for an order of *mandamus* is premature.

[57] Since the Applicant has failed to establish the first essential element for interim relief, it follows that its Motion must fail. It is not necessary to address the issues of irreparable harm and balance of convenience.

[58] It follows that the Applicant's Motion is dismissed.

[59] In closing, I acknowledge the general rule that a party cannot obtain, upon motion for interim relief, the ultimate relief sought in application for judicial review; see the decision in *Price v. Canada (Attorney General)*, 2003 FCT 764 at paragraph 31.

[60] Each party requested costs upon their respective motions. In the exercise of my discretion pursuant to Rule 400(1) of the Rules, I make no order as to costs.

**ORDER in T-425-20**

**THIS COURT ORDERS** that the motions are dismissed. In the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/ 98-106, there is no Order as to costs.

"E. Heneghan"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-425-20

**STYLE OF CAUSE:** IRIS TECHNOLOGIES INC. v THE MINISTER OF NATIONAL REVENUE

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** APRIL 14, 2020

**ORDER AND REASONS:** HENEGHAN J.

**DATED:** APRIL 17, 2020

**APPEARANCES:**

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