Federal Court  Cour fédérale

Date: 20210611

Docket: T-768-20

Citation: 2021 FC 597

Fredericton, New Brunswick, June 11, 2021

PRESENT: Madam Justice McDonald

BETWEEN:

IRIS TECHNOLOGIES INC.

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

ORDER AND REASONS

[1] This is a Motion by the Respondent, the Minister of National Revenue (the Minister), pursuant to Rule 51(1) of the *Federal Courts Rules*, SOR/98-106 [the Rules] appealing the January 21, 2021 Order of Prothonotary Aalto who refused the Minister's Motion to strike the judicial review application filed by Iris Technologies Inc (Iris).

[2] As alternative relief on this Motion, the Minister seeks an additional 30 days to respond to the Rule 317 request.

[3] For the reasons that follow, the appeal is dismissed. The Prothonotary did not err in the application of the law to his consideration of the Motion to strike the application for judicial review. In applying the standard of review set out in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*] at paras 28 and 66, there is no basis for this Court to intervene.

Relevant Background

[4] In its judicial review application filed on July 16, 2020, Iris seeks a declaration that:

a. the Minister failed to afford procedural fairness in the audit of Iris, failed to provide notice of or any opportunity to respond to any proposed adjustments, contrary to the ministers published policy thereon and the specific guarantee of the Minister's Assistant Commissioner;

b. the assessments of the Minister were made without evidentiary foundation and contrary to the findings of fact made by the Minister as of the date thereof; and

c. the assessments were made for the improper purpose of seeking to deprive the Federal Court of jurisdiction in Iris' Application for relief in Court File No. T-425-20.

[5] In a related file, T-425-20, Iris has applied for an order of *mandamus* requiring the Minister to issue assessments for Iris' monthly GST reporting for the periods of September 2019 to February 2020. This application is ongoing.

[6] In this application, on August 11, 2020, the Minister filed a Motion to strike Iris' application for judicial review on the basis that it is plain and obvious that Iris could not obtain

the relief that it seeks and that the judicial review application is an attempt to circumvent the comprehensive tax regime.

Prothonotary's Order

[7] The Prothonotary begins his analysis by referencing the test outlined by the Federal Court of Appeal in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 (*JP Morgan*) at para 47 as follows:

> [47] The court will strike a notice of application for judicial review only where there it is "so clearly improper as to be bereft of any possibility of success" [citations omitted]. There must be a "showstopper" or a "knockout punch" - an obvious, fatal flaw striking at the root of this Court's power to entertain the application: [citations omitted].

[8] The Prothonotary also cites *Ghazi v Canada (National Revenue)*, 2019 FC 860 at para 10 which states:

> [10] This is a high threshold to meet and, as the Court on a motion to strike may not have all of the relevant facts or law before it, the application will only be struck out in the clearest of cases.

[9] The Prothonotary then considers the arguments raised by the Minister. The Minister argued that the application is in essence an attack on the validity of assessments by the Minister, and that the application was an attempt to circumvent the exclusive jurisdiction of the Tax Court of Canada. The Minister also argued that the declarations sought by Iris was brought to bolster some future potential tort claim. To this last point, the Prothonotary notes that the future tort claim "is speculative until such time as one is commenced".

[10] The Prothonotary notes that the allegations raised by Iris in its application against the Minister include claims relating to a lack of procedural fairness, a lack of an evidentiary foundation, and acting for an improper purpose, all of which engage administrative law principles. The Prothonotary references the following statement of the Federal Court of Appeal in *Iris Technologies v Canada*, 2020 FCA 117 at para 51 that "…the Federal Court retains jurisdiction to consider the application of administrative law principles and obligations to the exercise of discretion by the Minister in the application of the ETA".

[11] The Prothonotary determined that the decision in *Canada (National Revenue) v Sifto Canada Corp*, 2014 FCA 140 was applicable and concluded "the conduct of the Minister as it relates to the issuance of the assessment, not the assessment itself, is the subject matter of the application. It cannot be said, as it was in Sifto by the FCA, that this application is bereft of any chance of success."

[12] Prothonotary Aalto further concluded:

> While the Minister's position is that this application fails to seek a cognizable remedy, a careful and holistic review of the notice of application negates this proposition. As noted above, the contents of pleadings must be accepted as true unless they are incapable of proof. The notice of application seeks clearly identifiable administrative law remedies in the declarations sought. Further, the grounds outlined in support of the notice of application provide a factual matrix which, if proven, could result in remedies which can be 'fact-specific remedies [see, *JP Morgan* at para 94]."

Preliminary Matter

[13] On this Motion, Iris sought to introduce an Affidavit of Samer Bishay sworn to on April 18, 2021. This Affidavit attaches documents recently disclosed by the Minister in response to a complaint filed by Iris with the Office of the Privacy Commissioner for failure of the Minister to comply with an *Access to Information Act* request.

[14] I refused to allow this Affidavit into evidence as it is well-established law that on a motion to strike pleadings no evidence is admissible (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 22).

Analysis

Standard of Review

[15] The decision of the Prothonotary was an exercise of discretion pursuant to Rule 221(1).

[16] The applicable standard of review is that "discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts" (*Hospira* at para 64).

[17] The correctness standard is a non-deferential standard of review in which the Court can substitute its own opinion, discretion or decision for that of the Prothonotary (*Hospira*, at para 68; *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 58).

[18] A palpable and overriding error is an error that is both obvious and apparent, "the effect of which is to vitiate the integrity of the reasons" (*Maximova v Canada (Attorney General*), 2017 FCA 230 at para 5).

[19] In the Notice of Motion, the Minister argues that the Prothonotary erred in fact and law in:

a) failing to acknowledge that the essential nature of the Application was an attack on the assessment

b) failing to properly consider adequate alternative remedies

c) failing to find that the declarations sought by Iris are not available remedies in administrative law.

[20] I will address each of these grounds below.

a) Essential Nature of the Application

[21] The Minister argues that the Prothonotary erred in law, attracting a correctness review, by characterizing the essential nature of the Application as a challenge to the conduct of the Minister in issuing the Reassessments, and not a challenge to the Reassessments themselves. The Minister characterizes the issue as the validity of the assessment, which is reviewable on the correctness standard.

[22] On this issue, the key findings of the Prothonotary are as follows:

> [29] In my view, the Minister is arguing a distinction without a difference. The application by *Sifto* in this Court sought declarations that the penalty assessments were invalid and unenforceable [*Sifto* at para 13]. The Minister sought to strike the application on grounds similar to those argued here, that is that this

> Court had no jurisdiction and that it was all within the purview of the TCC. Both this Court and the FCA disagreed and determined that the matter was not so bereft of any chance of success that it should be struck. There is very little difference, apart from the facts, that differentiates *Sifto* from the principles applicable in this case.
>
> [30] Further, although the Minister argues strenuously that any declaration of wrongdoing by the Minister is a matter to be considered in the TCC appeal, the argument fails to acknowledge that Iris is alleging a failure of procedural fairness which engages administrative law principles. Finally, the Minister argues that the declarations sought are themselves for an improper purpose, are purely factual and serve no useful purpose. The declarations, so the Minister argues, are irrelevant to determining the correctness of the assessments and are sought only to enhance a possible future tort claim against the minister. I disagree. The future tort claim is speculative until such time as one is commenced. The conduct of the Minister as it relates to the issuance of the assessment, not the assessment itself, is the subject matter of the application. It cannot be said, as it was in *Sifto* by the FCA, that this application is bereft of any chance of success.
>
> [31] In coming to this conclusion, I have carefully considered all of the submissions of the parties. I would also note the minister in her written representations concedes that this Court retains "some" jurisdiction in tax matters. While the Minister's position is that this application fails to seek a cognizable remedy, a careful and holistic review of the notice of application negates this proposition. As noted above, the contents of pleadings must be accepted as true unless they are incapable of proof. The notice of application seeks clearly identifiable administrative law remedies in the declarations sought. Further, the grounds outlined in support of the notice of application provide a factual matrix which, if proven, could result in remedies which can be "fact-specific remedies" [see, *JP Morgan* at para 94]. In all, in my view there is no "knock-out punch".

[23] The Minister relies upon *Windsor (City) v Canadian Transit Co*, 2016 SCC 54, *Canada v Addison & Leyen Ltd*, 2007 SCC 33, and *JP Morgan* to argue that the decisions which Iris seeks to review are not discretionary decisions but are assessments which are not subject to the exercise of any discretion by the Minister.

[24] I agree with the Minister that if the sole issue raised by Iris was the assessments, then the Tax Court is where this application should be addressed (*Canada (Attorney General) v Webster,* 2003 FCA 388). However, the Prothonotary determined that the issues raised by the Applicant and the relief sought go beyond tax assessments.

[25] The Minister relies on *Walsh v Canada (National Revenue)*, 2007 FCA 280 where the Federal Court of Appeal stated as follows at para 9:

> [9] The relief sought in the second application for judicial review was a declaration that the reassessments are unlawful or improper in a number of respects. Justice Hugessen concluded that the only purpose of such a declaration would be to serve as the foundation for the substantial relief, which is to set aside the reassessments, a remedy that is outside the jurisdiction of the Federal Court. He said at paragraph 5 of his reasons (2006 FC 56), that such relief would be "a meaningless exercise when divorced, as it must be, from the substantial question as to the validity of the assessment itself". We agree with those conclusions, and with the decision of Justice Hugessen to strike the second application for want of jurisdiction.

[26] Notwithstanding the decision in *Walsh*, here the analysis done by the Prothonotary was based upon the unique factual circumstances of this Application and determined that the relief sought by Iris goes beyond a challenge to the assessments by the Minister.

[27] In my view, the Minister takes too narrow a view of the issues raised in the Application. The Minister acknowledged in oral submissions that a judicial review may be available with respect to an audit. However, the Minister contends that once the Minister makes an assessment, there can be no judicial review. I do not read the authorities as drawing such a definitive line. Furthermore, this proposition runs contrary to the statement of the Federal Court of Appeal in *Iris Technologies Inc v Canada (National Revenue),* 2020 FCA 117 at para 51 which states in

part, "…the mere fact that the Minister has issued an assessment does not oust the Federal Court's jurisdiction under section 81.1 or 81.2."

[28] In *Johnson v Canada*, 2015 FCA 51 [*Johnson*] at para 24, the Federal Court of Appeal refers to the fact that the Applicant was challenging the sufficiency of information relied upon by the Minister in support of tax assessments. The Court addresses the Applicant's allegation that the Minister had an improper motive for the assessment (*Johnson* at para 27). At paragraph 29, the Court states:

> [29] Assuming without deciding that the Federal Court would have the jurisdiction to review the Minister's motivation or purpose for issuing an assessment and, if appropriate, issue a declaration that such assessment should not have been issued, this is not a case where I would find that such declaration should have been issued. The Minister is responsible for enforcing the provisions of the Act, which include the collection of net taxes owing under the Act. The fulfilment of the Minister's statutory responsibilities under the Act cannot be an improper motive for the Minister to issue an assessment.

[29] Like *JP Morgan*, the Federal Court of Appeal in *Johnson* leaves open the possibility that the Federal Court has jurisdiction even in circumstances where an assessment is part of the factual matrix.

[30] On the issue of improper purpose, Iris points to *Ficek v Minister of National Revenue*, 2013 FC 502 at para 18 where the Court states that "improper purpose goes to jurisdiction." Iris relies on *Main Rehabilitation Co v Her Majesty the Queen*, 2004 FCA 403 at para 6 which states, "it is also plain and obvious that the Tax Court does not have the jurisdiction to set aside an

assessment on the basis of an abuse of process at common law or in breach of section 7 of the *Charter*."

[31] In his order, Prothonotary Aalto notes that "although the Minister argues strenuously that any declaration of wrongdoing by the Minister is a matter to be considered in the TCC appeal, the argument fails to acknowledge that Iris is alleging a failure of procedural fairness which engages administrative law principles."

[32] I do not agree with the Minister that this is a veiled attack on the correctness of the assessment. This was considered by Prothonotary Aalto, who applied the relevant jurisprudence and concluded that this was not an attack on the assessment but on the procedural fairness of the assessment. Therefore, it is within the jurisdiction of the Federal Court.

b) Alternative Remedies

[33] The Respondent argues that the Prothonotary made an error of law in failing to properly address the Minister's argument that adequate alternative remedies were available to Iris. The Minister argues that Iris has remedies available through an objection process, a Tax Court appeal or a tort claim. The Minister relies on *JP Morgan* at paras 84-85 to argue that this judicial review cannot be entertained by this Court where an adequate alternative remedy exists.

[34] The Minister also relies upon *Strickland v Canada (Attorney General)*, 2015 SCC 37 to argue that "alternative remedies are available. In fact, they are superior to the remedy Iris seeks in its Application in that they offer the possibility of relief that actually benefits Iris."

[35] Prothonotary Aalto specifically considered the administrative law remedies and the relief available in the Tax Court, but confirmed that the Federal Court retains some jurisdiction. Prothonotary Aalto also found that the Minister's argument that a tort claim was available was speculative.

[36] The Minister's complaint that Prothonotary Aalto did not "properly address" the adequate alternative remedies is a disagreement with the result. Prothonotary Aalto clearly engaged with the Minister's argument regarding adequate alternative remedies. The Minister's argument fails to acknowledge the allegations raised by Iris. Specifically, as noted by Prothonotary Aalto "the argument fails to acknowledge that Iris is alleging a failure of procedural fairness which engages administrative law principles."

[37] Furthermore, Prothonotary Aalto notes "I have carefully considered all of the submissions of the parties. I would also note the Minister in her written representations concedes that this Court retains 'some' jurisdiction in tax matters."

[38] There is no merit to the Minister's assertion that Prothonotary Aalto failed to "properly address" alternate remedies.

c) Remedies in Administrative Law

[39] The Minister argues that the Applicant is seeking a declaration pertaining solely to findings of fact. The Minister takes issue with the Prothonotary's finding that the factual matrix which, if proven, could result in remedies. As noted by Prothonotary Aalto:

> …while it is true that the Federal Court may not invalidate an assessment…the Federal Court may grant a declaration based on administrative law principles that the Minister acted unreasonably…Similarly, the Federal Court may on the same basis grant another of the remedies sought…and if the application is not perfectly drafted at this stage, the Federal Court has ample scope for permitting amendments if required to ensure that the actual dispute is properly before the Court. (*Sifto* at para 25).

[40] The Minister argues that Iris is only seeking declaratory relief. Further, the Minister argues that there is no discretionary power on the part of the Minister in issuing an assessment, therefore the decision in *Sifto* is of no assistance to Iris.

[41] I disagree with these submissions as they fail to acknowledge that Iris claims that the Minister engaged in an abuse of process. As correctly noted by the Prothonotary, there is a distinction between the conduct of an assessment and the issuance of an assessment.

[42] On the issue of procedural fairness, the Minister seems to be arguing that these arguments cannot now be raised because the audit has been completed and an assessment has been issued. Again, I do not read any of the authorities as making such a definitive statement. Rather, it is clear from the jurisprudence that the Federal Court retains the ability to grant remedies if the Minister has breached procedural fairness. Furthermore, paragraph 69 of *J.P. Morgan* makes it clear that the Federal Court can review the Minister's actions.

[43] Prothonotary Aalto found that "the notice of application seeks clearly identifiable administrative law remedies in the declarations sought."

[44] In my view, the Prothonotary's reliance on *Sifto* was reasonable, and the issues raised by the Minister are better suited for the hearing of the Application.

[45] The threshold to strike a notice of application is a high one. It is not "plain and obvious" that this Application has no chance of success.

Conclusion

[46] Overall, the Prothonotary identified and applied the applicable law and the Minister has not established any error. Accordingly, this Motion is dismissed.

[47] In post-hearing submissions the parties agreed on the quantum of costs payable to the successful party. Accordingly, the Applicant, Iris, is entitled to costs in the all inclusive amount of $3,000.00.

ORDER IN T-768-20

THIS COURT ORDERS that:

1. The motion by the Minister of National Revenue is dismissed.

2. Iris Technologies Inc. is entitled to costs in the all-inclusive amount of $3,000.00.

3. The Minister shall have 20 days from the date of this Order to comply with Rule 317.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-768-20
STYLE OF CAUSE:	IRIS TECHNOLOGIES INC v THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	APRIL 20, 2021
ORDER AND REASONS:	MCDONALD J.
DATED:	JUNE 11, 2021

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