Date: 20080610

Docket: T-2040-07

Citation: 2008 FC 727

BETWEEN:

CHRYSLER CANADA INC.

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
THE MINISTER OF NATIONAL REVENUE,
AND THE CANADA REVENUE AGENCY

Respondents

REASONS FOR ORDER AND ORDER

[1] This motion brought by the Respondents seeks to strike out the notice of application essentially on the ground that the Federal Court is without jurisdiction in this application as it is a "direct attack on the validity of reassessments issued by the Minister". This, the Respondents argue, is outside the jurisdiction prescribed by s. 18.5 of the *Federal Courts Act* and can only be raised by the Applicant in a proceeding in the Tax Court of Canada.

[2] Thus, the issue for determination is whether or not the specific relief sought by the Applicant in this application lies solely within the jurisdiction of the Tax Court of Canada or whether it is the

proper subject matter of an application under s. 18.5 of the *Federal Courts Act*. Section 18.5 of the *Federal Courts Act* provides as follows:

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	**18.5** Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

THE NOTICE OF APPLICATION

[3] In the Notice of Application, the Applicant seeks, *inter alia*:

> . . . judicial review of acts or proceedings, including administrative action of the Canada Revenue Agency, (the "CRA") as directed by the Minister of National Revenue (the "Minister"), including persons acting on his behalf and having, exercising, or purporting to exercise jurisdiction or powers conferred under the *Income Tax Act* (Canada) (the "ITA") and the *Canada United States Income Tax Convention* (1980), as amended (the "Treaty").

[4] The additional or alternative relief sought by the Applicant is "judicial review of the Minister's decision to issue reassessments, dated October 19, 2007 and mailed by the CRA on October 23, 2007 (the "Reassessments") which purport to adjust the Applicant's tax liability for its 1996, 1997 and 1998 taxation years in respect of, *inter alia*, related party transactions which the Applicant entered into with an affiliate in the United States ("Transfer Pricing Transactions")".

[5] The Notice of Application specifically states that "[t]he Reassessments constitute the culmination of the administrative action which is the subject of this Application". The relief sought by the Applicant also includes a declaration "that the Reassessments are invalid to the extent they relate to the Transfer Pricing Transactions for 1996 – 1998 taxation years"; and, a declaration that "by issuing the Reassessments with adjustments for the Transfer Pricing Transactions that are substantially inconsistent with the 2002 and 2004 letters, the Minister exercised his discretion unfairly, for an improper purpose, and based upon irrelevant considerations inconsistent with established policies".

[6] The 2002 and 2004 letters are a key element of the judicial review sought by the Applicant in this Application and are letters upon which the Applicant relied in asserting rights under the Treaty.

JURISDICTION OF THE TAX COURT

[7] There is no doubt, as the Respondents vigorously argue, that the ITA contains a complete code for the assessment of income taxes and appeals taken from assessments. Section 169(1) of the ITA and Section 12 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 12 (the "TCC Act") support the proposition that the Tax Court has exclusive jurisdiction to hear appeals relating to

assessments of income tax and to determine the correctness of income tax assessments. Section 12.(1) of the TCC Act provides as follows:

Jurisdiction	**Compétence**
12.(1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act* , the *Canada Pension Plan* , the *Cultural Property Export and Import Act* , Part V.1 of the *Customs Act* , the *Employment Insurance Act* , the *Excise Act, 2001* , Part IX of the *Excise Tax Act* , the *Income Tax Act* , the *Old Age Security Act* , the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act, 2006* when references or appeals to the Court are provided for in those Acts.	**12.(1)** La Cour a compétence exclusive pour entendre les renvois et les appels portés devant elle sur les questions découlant de l'application de la *Loi sur le droit pour la sécurité des passagers du transport aérien* , du *Régime de pensions du Canada* , de la *Loi sur l'exportation et l'importation de biens culturels* , de la partie V.1 de la *Loi sur les douanes* , de la *Loi sur l'assurance-emploi* , de la *Loi de 2001 sur l'accise* , de la partie IX de la *Loi sur la taxe d'accise* , de la *Loi de l'impôt sur le revenu* , de la *Loi sur la sécurité de la vieillesse*, de la *Loi de l'impôt sur les revenus pétroliers* et de la *Loi de 2006 sur les droits d'exportation de produits de bois d'oeuvre* , dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

[8] There are many authorities cited by the Respondents for the proposition that the Tax Court has exclusive original jurisdiction to hear matters related to assessments [see for example, *M.N.R. v. Parsons* (1984), 84 D.T.C. 6345 (F.C.A.)]. In their submissions, however, the Respondents concede that another court cannot assume jurisdiction over the validity of an assessment except over

matters ancillary to the assessment which are otherwise within that court's jurisdiction. The Respondents also concede that the Tax Court's jurisdiction is limited in that it "cannot set aside an assessment on alleged impropriety on the part of the Minister, or because the Minister acted unfairly or violated his own policies."

[9] Thus, in order to determine if the Application is, in pith and substance, an attack on the validity of assessments or the correctness of assessments it is necessary to review the underlying facts alleged in the Notice of Application, which, for purposes of a motion in this nature, must be accepted as true.

BACKGROUND

[10] The Applicant is a corporation resident in Canada for purposes of the *ITA*. During the 1996 - 1999 taxation years the Applicant was a wholly owned subsidiary of Chrysler Corporation, a U.S. Corporation.

[11] During the relevant taxation years the Applicant's business consisted of, *inter alia*, the assembly of vehicles for Chrysler Corporation and the sale of such vehicles for Chrysler Corporation. Thus, the Applicant and Chrysler Corporation entered into related party cross border transactions relating to the assembly of vehicles and sale of vehicles, the Transfer Pricing Transactions.

[12] Transfer Pricing Transactions give rise to Transfer Pricing Adjustments as permitted under the Treaty. Notice of exercising such rights must be given within six years of the taxation year. In 2002 and 2004 CRA issued letters to the Applicant regarding proposed Transfer Pricing Adjustments to the income it earned from the Transfer Pricing Transactions for its 1996 – 1998 taxation years (the "Prior Letters"). The Prior Letters indicated that their purpose was to enable the parties to the Transfer Pricing Transactions to avail themselves of rights available under the Treaty. The Applicant did so and notified the Internal Revenue Service ("IRS") of the Prior Letters. Rights available to the Applicant under the Treaty enable the Applicant to avoid the imposition of double taxation on the Transfer Pricing Transactions.

[13] Subsequently, on April 29, 2005, CRA issued new letters to the Applicant that proposed entirely different Transfer Pricing Adjustments for the 1996 - 1998 taxation years (it is to be noted that the 1999 taxation year is not in dispute in this Application). The new CRA letters proposed substantial increases to the Applicant's income subject to tax which fundamentally altered the methodology for determining the Applicant's income for the Transfer Pricing Transactions and included transactions that were not identified in the Prior Letters.

[14] Although the new CRA letters were issued within the six year period required under the Treaty for the 1999 taxation year, for the1996 – 1998 taxation years, they were issued outside the requisite six year time frame which would have allowed the Applicant to exercise its Treaty rights. Thus, the Applicant was deprived of its entitlement to require the IRS to provide relief from double taxation for the 1996-1998 taxation years as contemplated by the Treaty. The Applicant alleges that the Minister's decision to issue the Reassessments on the basis of the new CRA letters constitute an

improper, discriminatory exercise in the discretion to the Minister under the Treaty. The conduct of the Minister in issuing the Reassessments essentially forecloses the exercise of rights by the Applicant.

[15] As the Applicant notes, it is the decision to issue the Reassessments for the 1996 – 1998 tax years that are the focus of the Application since "this resulted from improper exercise of the Minister's discretion granted by paragraph 4 of article 9 of the Treaty." It is the improper exercise of discretion by the Minister that the Applicant argues is the essence of this Application and not the Reassessments themselves although they are the culmination of the improper exercise of the discretion.

[16] The Applicant alleges that the improper exercise of discretion by the Minister arises from administrative action relating to the two new CRA letters to the Applicant that propose significantly different Transfer Pricing Adjustments to the income the Applicant earned from the Transfer Pricing Transactions for the taxation years 1996 – 1998.

[17] As argued by the Applicant it does not challenge the ability of the Minister to issue the Reassessments provided that those Reassessments are issued on the basis of a discretion that is consistent with the Prior Letters. Thus, the Application does not seek to challenge the correctness of the Reassessments which result in the alleged double taxation, it only seeks to judicially review the Minister's exercise of discretion in determining to issue the Reassessments contrary to the Prior Letters.

[18] The importance of the inter-relationship between the ITA and the Treaty for the Applicant is described in the following example and description set out in the Notice of Application:

> For the purposes of calculating income tax liability, the tax authorities in Canada and the United States are generally entitled (pursuant to the respective taxing statues and subject to any tax treaty obligations) to adjust the income of an entity subject tax in its jurisdiction arising on cross-border transactions between related parties to the amounts that would have been charged had the parties been dealing at arm's length.
>
> For example, if a corporation in one country transferred goods to a related corporation in a second country for $100 that an arms length party would only agree to transfer for $1,000 in comparable circumstances, the tax authority in the first country would increase the income of the transferor corporation by $900 for purposes of computing that corporation's income tax liability for the year in which the transfer occurred. Such adjustments are typically referred to as Transfer Pricing Adjustments.

[19] One of the purposes of the treaty is to deal with such Transfer Pricing Adjustments so that international double taxation does not occur. International double taxation can occur if an adjustment by the CRA to the increase in the sale price of the goods sold by a Canadian transferor for Canadian income tax purposes is made without a corresponding adjustment by the IRS that would increase the purchase price paid by the U.S. transferee for U.S. income tax purposes. That is what the applicant alleges is occurring in this case as a result of discretionary decisions made by the Minister which amount to abuse of power and are therefore the subject of judicial review.

TEST ON A MOTION TO STRIKE

[20] As this is a motion to strike, the allegations in the notice of application must be accepted as true. The test on a motion to strike is well known. Simply put, the test is whether the application, if allowed to proceed, would be "clearly futile" or that it is "plain and obvious" that it does not have any possibility of success [see, for example, *David Bull Laboratories (Canada) Inc.* v. *Pharmacia Inc.*, [1995] 1 F.C. 588 (C.A.) at pp. 596-598 and 600; *Amnesty International Canada et al.* v. *Chief of Defence Staff et al.*, [2007] FC 1147; and *Sanofi-Aventis Canada Inc.* v. *Novopharm Ltd.* (2007), 59 C.P.R. (4th) 416 (F.C.A.) at pars. 31 - 34]. If the Tax Court has exclusive original jurisdiction over the issues in this Application then this Application is "clearly futile" and it is "plain and obvious" that it is bereft of any possibility of success. However, in my view of the Application, it is not plain and obvious that this Court is without jurisdiction to entertain this Application.

ANALYSIS

[21] Of the many authorities cited by the parties in both the written submissions and during the course of argument, the two most helpful decisions are *Addison & Leyen Ltd. v. Canada*, (2007) SCC 33 and *Canada v. Roitman*, 2006 DTC 6514. In *Addison*, the taxpayer sought judicial review of the Minister's decision to issue a reassessment under section 160 (2) of the ITA, which applies to a taxpayer alleged to be vicariously liable for the tax debts of a non-arm's length party. Section 160(2) allows such a reassessment to be issued "at any time". The taxpayers in question were reassessed under section 160(2) more than twelve years after the tax years to which the

reassessments related. The taxpayers alleged that the decision to reassess them at that late date resulted in undue hardship and was an abuse of the Minister's discretion.

[22] *Addison* was an application commenced in the Federal Court that sought judicial review of the reassessments alleging delay, unfairness and abuse of process. The Minister brought a motion for an Order dismissing the application for want of jurisdiction. The motions judge found that by operation of section 18.5 of the *Federal Courts Act*, the Federal Court lacked jurisdiction to hear applications for judicial review for matters for which an appeal lies to the Tax Court of Canada "to the extent that [they] may be appealed".

[23] The Applicants appealed to the Federal Court of Appeal which overturned the decision of the motions judge. The appellate court found that section 18.5 of the *Federal Courts Act* is not sufficient to exclude judicial review of actions taken under section 160 of the ITA. The Federal Court of Appeal found, *inter alia* that the Federal Court had the authority to quash an assessment in light of the fact that no alternate remedy was readily available. The Minister appealed to the Supreme Court of Canada. The appeal was allowed. However, the Supreme Court of Canada allowed the appeal on very narrow grounds which arose solely from the facts of the case and the application of Section 160(2) of ITA to those facts. The Supreme Court of Canada did not determine that the Federal Court had no jurisdiction to judicially review a decision of the Minister on issues relating to tax. The Court observed as follows:

> 8. We need not engage in a lengthy theoretical discussion on whether s.18.5 can be used to review the exercise of ministerial discretion. It is not disputed that the Minister belongs to the class of persons and entities that fall within the Federal Court's jurisdiction

under s.18.5. **Judicial review is available, provided the matter is not otherwise appealable**. It is also available to control abuses of power, including abusive delay. Fact-specific remedies may be crafted to address the wrongs or problems raised by a particular case.

9. Nevertheless, we find that judicial review was not available on the facts of this case. As Rothstein J.A. pointed out, the interpretation of s. 160 by the majority of the Federal Court of Appeal amounted to reading into that provision a limitation period that was simply not there. The Minister can reassess a taxpayer at any time. In the words of Rothstein J.A.:

> While in the sense identified by the majority, subsection 160(1) may be considered a harsh collection remedy, it is also narrowly targeted. It only affects transfers of property to persons in specified relationships or capacities and only when the transfer is for less than fair market value. Having regard to the application of subsection 160(1) in specific and limited circumstances, Parliament's intent is not obscure. Parliament intended that the Minister be able to recover amounts transferred in these limited circumstances for the purpose of satisfying the tax liability of the primary taxpayer transferor. The circumstances of such transactions mak[e] it clear that Parliament intended that there be no applicable limitation period and no other condition on when the Minister might assess. [para. 92]

10. The Minister is granted the discretion to reassess a taxpayer at any time**. This does not mean that the exercise of this discretion is never reviewable**. However, in light of the words "at any time" used by Parliament in s.160 *ITA*, the length of the delay before a decision on assessing a taxpayer is made does not suffice as a ground for judicial review, except, perhaps inasmuch as it allows for a remedy like mandamus to prod the Minister to act with due diligence once a notice of objection has been filed. Moreover, in the case at bar, the allegations of fact in the statement of claim do not disclose any reason why it would have been impossible to deal with the tax liability issues relating to either the underlying tax assessment against York or the assessments against the respondents through the regular appeal process.

> 11. Reviewing courts should be very cautious in authorizing judicial review in such circumstances. The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context. [**emphasis added**]

[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.

[25] Thus, while the Minister has a discretion to reassess a taxpayer at any time it does not preclude a review of the Minister's discretion where a matter is not otherwise appealable. Such is the case here. The Applicant concedes that the Minister has the right to issue reassessments. However, the Applicant is not seeking to review the reassessments but rather the Minister's

discretionary decision, his prior conduct and his general discretion to provide relief from double taxation. These are not matters which fall within the exclusive jurisdiction of the Tax Court.

[26] Further support for this conclusion can be found in the *Roitman* case. In that case the Applicant was a businessman who was a director of a company engaged in the business of buying and selling automobiles. The Minister disallowed certain claims for expenses. Roitman and the company objected to the reassessments and ultimately a settlement with the Minister was reached. Both Roitman and the company were parties to the settlement and Roitman was reassessed in accordance with the terms of the settlement. Subsequently, Roitman commenced a claim as a proposed class action against the Minister in which it was alleged that the Minister engaged in "deliberate conduct…to deny…the Plaintiff the benefit of the law". The cause of action was misfeasance in public office. A motion was brought to strike the action. The motion was dismissed essentially because the claim did not seek to set aside the reassessment but was in essence a claim for damages for the fraudulent actions of the Minister. An appeal was taken to the Federal Court of Appeal. That Court reviewed at length the jurisdiction of the Federal Court and the Tax Court. In its decision, the Federal Court of Appeal noted that "[i]t is settled law that the Federal Court does not have jurisdiction to award damages or grant any other relief that is sought on the basis of an invalid reassessment of tax unless the reassessment has been overturned by the Tax Court. To do so would be to permit a collateral attack on the correctness of an assessment." [citations omitted]

[27] The Court also observed that "it is also settled law that the Tax Court of Canada does not have jurisdiction to set aside an assessment on the basis of abuse of process or abuse of power (see *Main Rehabilitation Cole v. R.*, 2004 FCA 403 (F.C.A.), para. 6; *Obonsawin v. R.*, 2004 G.T.C. 131 (TCC

[General Procedures]); *Burrows v. R.*, 2005 TCC 761 (T.C.C.) [General Procedures]); *Hardtke v. R.*, 2005 TCC 263 (T.C.C.) [General Procedures])". This observation applies equally to the relief sought in this Application. The focus of this Application is the abuse of process of the Minister in the exercise of the discretion relating to double taxation. The correctness of the reassessments is not the issue. While in *Roitman*, the Federal Court of Appeal held that the Statement of Claim was an abuse of process and therefore was struck, they did so on the basis that the correctness involved in the Notice of Reassessment was the primary issue in the Statement of Claim and thus was properly a matter to be dealt with by the Tax Court. At best, the Federal Court of Appeal noted that the Statement of Claim in *Roitman* was premature.

[28] In my view of this Application, it is not the reassessments which are central to the judicial review. Rather, it is the alleged impropriety on the part of the Minister in relation to the Transfer Pricing Transactions which flows from the alleged improper, unfair and discriminatory exercise of the discretion to proceed with reassessments which are alleged to amount to double taxation.

[29] The motion is therefore dismissed with costs in any event of the cause to the Applicant.

ORDER

THIS COURT ORDERS that the motion is dismissed with costs to the Applicant in any event of the cause.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2040-07
STYLE OF CAUSE:	CHRYSLER CANADA INC. v. HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE MINISTER OF NATIONAL REVENUE, AND THE CANADA REVENUE AGENCY
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