Federal Court Cour fédérale

Date: 20131205

Dockets: T-437-12
T-967-12

Citation: 2013 FC 1219

Ottawa, Ontario, December 5, 2013

PRESENT: The Honourable Madam Justice Mactavish

Docket: T-437-12

BETWEEN:

GENERAL MOTORS OF CANADA LIMITED

Applicant

And

MINISTER OF NATIONAL REVENUE

Respondent

Docket: T-967-12

AND BETWEEN:

RICHARD SZYMCZYK

Applicant

And

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] For over 25 years, General Motors of Canada Limited (GMCL) calculated the value of the taxable benefits received by certain of its senior employees in connection with the use of company cars in accordance with a formula that had been agreed to by Revenue Canada Taxation in 1982 ("the 1982 formula").

[2] In 2012, the Canada Revenue Agency (CRA), (the successor to Revenue Canada Taxation), advised GMCL that the 1982 formula was no longer appropriate, and that the automobile benefits for GMCL employees for the 2008 taxation year had been incorrectly calculated. The CRA then re-assessed the automobile-related taxable benefits for some 350 GMCL employees. One of these employees was Richard Szymczyk.

[3] GMCL and Mr. Szymczyk accept that it was open to the CRA to re-evaluate the situation in 2012 and to adopt a different approach to the calculation of automobile-related taxable benefits on a going-forward basis. However, they submit that GMCL and its employees relied upon the 1982 formula in calculating the value of the automobile-related taxable benefits for GMCL employees, and that it was unfair for the CRA to reassess those benefits using a different formula on a retrospective basis.

[4] GMCL and Mr. Szymczyk have each commenced applications for judicial review challenging the CRA's actions. The Minister has brought motions to strike both of the applications. In accordance with the Order of Justice Gleason, the motions to strike were heard together with the merits of the two applications.

[5] For the reasons that follow, I have determined that the relief sought by GMCL is not available in this Court. I am further satisfied that GMCL's Notice of Application fails to raise a "cognizable administrative law claim", as that term was used by the Federal Court of Appeal in *Canada (Minister of National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2013] F.C.J. No. 1155 (*JP Morgan*). As a consequence, GMCL's application for judicial review will be dismissed.

[6] I am further satisfied that this Court does not have the power to grant the relief sought by Mr. Szymczyk in his application for judicial review. As a result, his application will also be dismissed.

1. Background

[7] GMCL makes automobiles available to certain management and executive-level employees through its Product Evaluation Program ("the Program"). The Program is intended to increase product visibility, to provide a pool of cars for work-related employee travel, and to obtain continuous and timely evaluations of GMCL products from its employees.

[8] Under section 6 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), GMCL employees are required to include a "reasonable standby charge" and an "automobile operating expense benefit" (together, the "taxable benefits") when calculating their income for income tax purposes. The amount of the taxable benefits depends, in part, on the cost of the vehicle in question and the extent of the employee's personal use of that vehicle.

[9] It is GMCL's responsibility to compute the value of the taxable benefits, determine source deductions and prepare T4 slips each year for each employee.

The 1982 Formula

[10] In 1982, in anticipation of amendments to the Act governing the taxation of automobile benefits, GMCL sought direction from the Minister with respect to the computation of the taxable employee benefits flowing from the Program.

[11] GMCL had encountered difficulties in determining the cost of vehicles used by its employees, given that the vehicles had not been purchased or leased from a third party. Problems were also encountered in keeping track of who was using which vehicle as a result of the frequent reassignment of vehicles and the pooling of vehicles during working hours for use by multiple employees. Finally, difficulties had arisen in attempting to quantify and distinguish between personal and business use of vehicles, given that GMCL employees enrolled in the Product Evaluation Program ("Program Employees") were expected to promote GMCL products when they were outside of the workplace, and to assess and report on the performance of the vehicles during both business and personal use.

[12] By letter dated September 7, 1982, the Minister set out a specific formula for GMCL to use in computing the value of the taxable benefits received by Program Employees. The letter included instructions as to how to calculate the cost of vehicles to GMCL and how to determine the extent of Program Employees' personal use of the vehicles.

[13] The Minister challenges the admissibility of the September 7, 1982 letter, which was included in the record through the affidavit of David Penney. Mr. Penney is identified in his affidavit as the General Director Taxes for GMCL. The Minister objects to the admission of the letter, arguing that it constitutes hearsay evidence as Mr. Penney was not employed by GMCL in 1982. The Minister further submits that the letter contains information that is not within Mr. Penney's personal knowledge, and he has not provided the source of his information regarding the correspondence.

[14] As a result of his job, Mr. Penney was in a position to provide first-hand evidence as to GMCL's practice regarding the calculation of taxable automobile benefits for Program Employees for 2008 and its reliance on the 1982 formula. Moreover, while the Minister claims that she cannot locate a copy of the September 7, 1982 letter in her own files, she does not dispute the authenticity of the document. Moreover, this letter and the 1982 formula are specifically referred by the CRA in communications with GMCL leading up the 2012 reassessment. In these circumstances I am prepared to exercise my discretion to admit the September 7, 1982 letter into evidence.

[15] The September 7, 1982 letter included an acknowledgment by the Minister of the "administrative difficulties" encountered by GMCL in accurately assessing the taxable benefits for each of the Program Employees, given the high turnover rate of the vehicles and variations in personal versus work-related use.

[16] As a result, instead of requiring GMCL to conduct a personalized assessment of the taxable benefits received by each Program Employee, the Minister agreed to adopt a single approach covering all eligible Program Employees. The Minister opted to base the stand-by charge on the "average cost" of all passenger vehicles sold by GMCL in Canada. The Minister further accepted an across-the-board 50/50 split between personal and business use of the vehicles for all of the Program Employees.

[17] The September 7, 1982 letter concluded with the statement that "If our position is agreeable to GM, this letter will serve as your authority to proceed accordingly".

[18] GMCL agreed with the Minister's proposal. It asserts that it then relied upon the 1982 formula to compute employees' taxable benefits, determine source deductions and prepare T4 slips for each taxation year from 1982 up to 2011. GMCL and Mr. Szymczyk both state that they did not keep detailed records regarding individual vehicle use during this period because they understood that the Minister would rely upon the 1982 formula in valuing Program Employees' taxable benefits.

The 2010 Benefits Audit

[19] In May of 2010, the CRA commenced an employer compliance audit. As part of that audit, in March of 2011, a CRA employee began reviewing the records provided by GMCL with respect to the calculation of the taxable benefits for automobiles used by Program Employees in the 2008 taxation year.

[20] The auditor determined that the cost values used to calculate the stand-by charges for the vehicles used by Program Employees were less than the Manufacturer's Suggested Retail Price for the automobiles in question. The auditor further determined that Program Employees had failed to record the extent of their personal and business use of the vehicles, affecting the accuracy of the automobile operating expense benefit calculation.

[21] After discussions with representatives of GMCL, on February 15, 2012, the Minister sent letters and a fact sheet to GMCL advising that GMCL had failed to properly calculate the taxable benefits for approximately 350 Program Employees for the 2008 taxation year. As a result, the Minister proposed to issue amended T4 slips to the affected employees reflecting a higher amount of taxable benefits than had been calculated by GMCL pursuant to the 1982 formula.

[22] The Minister explained in the February 15, 2012 letter that the calculation method set out in the 1982 formula was no longer valid due to "changes to the facts provided in the original request". For example, the Minister noted that computers would ease the administrative burden of recording vehicle use, since "employees are able to access information easily and readily". The Minister also observed that Interpretation Bulletins had been issued since 1982 relating to the calculation of the taxable benefits. Finally, the Minister noted that because the cost of each vehicle assigned to employees was available, the automobile benefit could be calculated based upon actual vehicle cost.

[23] Insofar as the ratio of business to personal vehicle use was concerned, the Minister noted that it was necessary for employers and employees to keep records regarding their vehicle use.

Recognizing that neither GMCL nor Program Employees had kept such records, the Minister stated that "an approximation could have been considered using appointment calendars, expense reports or other sources". The Minister noted that this had not been done, and that, moreover, the Minister's requests that GMCL provide details as to how the Program vehicles were pooled had gone unanswered. As a result, the Minister indicated that personal vehicle use for each Program Employee would be estimated at 20,004 kilometres per employee.

[24] Subsequent to the Minister's February 15, 2012 letter, the CRA issued revised T4 slips recalculating the Program Employees' taxable automobile benefits for the 2008 taxation year.

[25] Mr. Szymczyk had declared a taxable benefit for 2008 in the amount of $7,988.81 in accordance with the T4 issued to him by GMCL. The Minister made no adjustment to this amount in Mr. Szymczyk's 2008 notice of assessment. However, in 2012 the Minister issued a revised T4 for Mr. Szymczyk for the 2008 taxation year, increasing the value of his taxable benefit by $8,280.23. The Minister issued a reassessment on April 16, 2012, assessing a total of $4,456.41 in additional tax payable by Mr. Szymczyk.

[26] Mr. Szymczyk states that the Minister never sought any information from him regarding his participation in the Program. He further says that he has no knowledge of the cost to GMCL of the Program vehicles that he drove in 2008, nor does he have access to this information.

[27] Mr. Szymczyk is pursuing the appeals process contemplated by the *Income Tax Act*, having filed a Notice of Objection with the CRA with respect to his reassessment. In addition, he

commenced his application for judicial review in this Court. GMCL has also commenced an application for judicial review with respect to the Minister's actions.

2. The Applications for Judicial Review

[28] GMCL's application for judicial review challenges "a decision of the Minister of National Revenue … that GMCL had failed to properly determine the 'reasonable standby charge' and the 'automobile operating expense benefit' under section 6 of the *Income Tax Act* … for approximately 350 employees in respect of their 2008 taxation year, with the result that GMCL had failed to properly meet certain obligations in respect of those employees…".

[29] Mr. Szymczyk's application for judicial review challenges "a decision of the Minister of National Revenue … to issue a reassessment dated April 6, 2012 on the basis that [GMCL] had failed to properly determine the 'reasonable standby charge' and the 'automobile operating expense benefit' under section 6 of the *Income Tax Act* … for the applicant's 2008 taxation year …".

[30] Both applications for judicial review state that the Minister "faults GMCL for having relied on specific directions received from the Minister, and consistently followed by the Minister for over 35 years, for the calculation of the 'reasonable standby charge' and the 'automobile operating expense benefit'".

[31] GMCL's Notice of Application states that it is seeking a writ of *certiorari* quashing the decision at issue by way of relief. GMCL also seeks a writ of prohibition to prevent the Minister

from assessing Program Employees for tax, interest and/or penalties for the 2008 taxation year, and a declaration that any assessments issued by the Minister to Program Employees for the 2008 taxation year on the basis of the decision under review are invalid and unenforceable.

[32] By his Notice of Application, Mr. Szymczyk seeks a declaration that the reassessment issued by the Minister to him on April 16, 2012 for the 2008 taxation year is invalid and unenforceable.

3. The Motions to Strike

[33] The Minister has brought motions to strike both GMCL and Mr. Szymczyk's applications for judicial review.

[34] In the case of GMCL, the Minister submits that the Minister's February 15, 2012 letter advising GMCL that its calculation of Program Employees' taxable benefits had not been done correctly is not a "decision" that is amenable to judicial review. The Minister further asserts that GMCL does not have standing to bring its application for judicial review as it was not "directly affected" by the Minister's decision to reassess Program Employees.

[35] The Minister also contends that the relief sought by GMCL is not available as this Court does not have the power to grant declaratory relief preventing the Minister from carrying out her mandated jurisdiction to implement the *Income Tax Act*. Finally, the Minister asserts that GMCL's Notice of Application fails to raise a "cognizable administrative law claim", as that term has recently been used by the Federal Court of Appeal in *JP Morgan*.

[36] Insofar as Mr. Szymczyk's application for judicial review is concerned, the Minister contends that his application should be struck as it is barred by Section 18.5 of the *Federal Courts Act*, R.S.C., 1985, c. F-7. This is because Mr. Szymczyk has a right of appeal to the Tax Court of Canada, which has exclusive jurisdiction to deal with the issues raised by his application for judicial review. The Minister further asserts that the Federal Court does not have the power to vacate a tax assessment or to or to declare it to be invalid or unenforceable. Finally, the Minister argues that Mr. Szymczyk's 2008 income tax reassessment is not a "decision" that is amenable to judicial review.

[37] It should be noted that hearing of the motions to strike and the merits of these applications took place prior to the release of the Federal Court of Appeal's decision in *JP Morgan*. As a consequence, the arguments advanced by the parties do not correspond precisely with the analytical framework articulated by the Federal Court of Appeal in that case.

[38] The parties were, however, afforded an opportunity to make further submissions with respect to the significance of the *JP Morgan* decision for these cases, and those submissions have been taken into account in my analysis.

A. Principles Governing Motions to Strike

[39] The Minister's motion to strike is brought under Rule 221(1)(a) of the *Federal Courts Rules*, SOR/98-106, which provides that:

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(*a*) discloses no reasonable cause of action or defence, as the case may be,	*a*) qu'il ne révèle aucune cause d'action ou de défense valable;
[…]	[…]
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

[40] On a motion to strike an application, the facts alleged in the Notice of Application to strike must be assumed to be true: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321 at para. 54.

[41] Applications for judicial review should not be struck out unless the application is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories v. Pharmacia Inc.*, [1995] 1 F.C. 588, 176 N.R. 48 (F.C.A.) at para. 15.

B. The Motion to Strike GMCL's Application for Judicial Review

[42] As was noted earlier, GMCL's application for judicial review challenges what it says was the "decision" contained in the CRA's February 15, 2012 letter informing GMCL that it had failed to properly determine the 'reasonable standby charge' and the 'automobile operating expense benefit' for the Program Employees for the 2008 taxation year.

[43] The Minister asserts that GMCL does not have standing to bring its application for judicial review and that the February 15, 2012 letter is not a "decision" amenable to judicial review with the result that the application should be struck. The Minister also contends that the relief sought by GMCL is not available as this Court does not have the power to grant declaratory relief preventing the Minister from carrying out her mandated jurisdiction to implement the *Income Tax Act*. Finally, the Minister argues that GMCL's application fails to raise a cognizable administrative law claim.

[44] Each of these arguments will be addressed below.

i) Does GMCL have Standing to Bring its Application for Judicial Review?

[45] The Minister says that GMCL's application for judicial review should be struck on the basis that it does not have standing to bring the application as it was not "directly affected" by the proposed reassessment of the Program Employees.

[46] The Minister cites the test for standing identified by the Supreme Court of Canada in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*,

2012 SCC 45, [2012] 2 S.C.R. 524, submitting that GMCL has failed to show that there is no other reasonable and effective way in which the questions raised by its application may be brought to court. According to the Minister, Program Employees can bring the issues raised by GMCL's application before the Courts and there is thus no need to grant standing to GMCL.

[47] It is important to note that the discussion in the *Downtown Eastside* case centered on the issue of *public interest* standing. That is not the only issue here. GMCL's primary argument is that it has itself been "directly affected" by the Minister's February 15, 2012 letter, as that term is used in subsection 18.1(1) of the *Federal Courts Act*, with the result that it has standing to challenge the decision in issue.

[48] As a general proposition, a court should strike an application for judicial review for lack of standing on a preliminary motion to strike "only in very clear cases": *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 F.C. 211, 157 F.T.R. 123 at para. 25. However, given that the motion to strike in this case was heard in conjunction with the merits of the application, it is more appropriate to determine the standing issue, not as a preliminary motion, but as a substantive challenge to the application in the context of the record as a whole.

[49] When regard is had to that record, I am satisfied that GMCL is not an "officious inter-meddler" - that is, the type of applicant that the standing requirement is intended to exclude: *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2006 FCA 144, 350 N.R. 101 at para. 17.

[50] The jurisprudence teaches that the words "directly affected" in subsection 18.1(1) of the *Federal Courts Act* are not to be given a restricted meaning: *Alberta v. Canadian Wheat Board*, [1998] 2 F.C. 156, 138 F.T.R. 186 at para. 26.

[51] At paragraph 21 of *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321, the Supreme Court of Canada cited Gibbs J. in *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257, 146 C.L.R. 493 at p. 271, and adopted the view that a party will have standing where "he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails": see also *League for Human Rights of B'Nai Brith Canada v. Canada*, 2008 FC 732, 334 F.T.R. 63, at paras. 23-25.

[52] I am prepared to accept that GMCL has indeed been "directly affected" by the Minister's February 15, 2012 letter, as it imposes legal obligations on GMCL, or prejudicially affects it directly: *Rothmans of Pall Mall Canada Ltd. v. Canada (Minister of National Revenue*), [1976] 2 F.C. 500, 67 D.L.R. (3d) 505 at para. 13 (F.C.A.).

[53] In coming to this conclusion, I note that the correspondence from GMCL outlines the administrative burden that would be imposed on it and the logistical difficulties that it would encounter, if it were required to calculate the value of the taxable automobile benefits received by its Program Employees in the manner suggested by the CRA.

[54] The change in the methodology to be used in calculating taxable automobile expenses for Program Employees required by the Minister would create a significant additional administrative burden for GMCL in carrying out its statutory duties under the *Income Tax Act*. This is sufficient to bring GMCL within the purview of subsection 18.1(1) of the *Federal Courts Act* as a party "directly affected" by the Minister's actions.

ii) No "Decision" made with Respect to GMCL

[55] The next question is whether the Minister's February 15, 2012 letter advising GMCL that its calculation of Program Employees' taxable benefits had not been done correctly is a "decision" that is amenable to judicial review insofar as it relates to GMCL.

[56] The Minister says that, unlike Mr. Szymczyk, GMCL has not had its taxes reassessed, nor have its substantive rights been in any way affected by the February 15, 2012 letter. According to the Minister, the letter is merely an expression of the Minister's intention to reassess, and no one's rights were affected until such time as Notices of Reassessment were actually issued to the Program Employees. Consequently, the Minister submits that insofar as GMCL is concerned, the Minister's February 15, 2012 letter is not a decision that is amenable to judicial review.

[57] In support of this contention, the Minister relies upon the decision in *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149, for the proposition that judicial review is not available where the conduct in issue does not affect legal rights, impose legal obligations, or cause prejudicial effects.

[58] The Minister cites the decision in *Rothmans, Benson & Hedges Inc. v. Canada (Minister of National Revenue)* (1998), 148 F.T.R. 3, [1998] F.C.J. No. 79 as authority for the proposition that tax actions such as advance rulings or technical interpretations have no binding legal effect as they do not grant or deny a right, or have any legal consequences.

[59] The Minister also relies on *Neeb v. Canada (Minister of National Revenue)* (1990), 38 F.T.R. 73, 90 D.T.C. 6666, where this Court held that a letter indicating that a taxpayer's taxes may be reassessed is not reviewable. Rather, a taxpayer's right to challenge a Ministerial decision is not triggered until such time as the reassessment is actually issued.

[60] However, subsection 18.1(1) of the *Federal Courts Act* does not limit the availability of judicial review to "decisions". Instead it provides that an application for judicial review may be brought by anyone directly affected by "the *matter* in respect of which relief is sought" [my emphasis].

[61] As to what constitutes a "matter" for the purposes of subsection 18.1(1), the Federal Court of Appeal held in *Krause v. Canada*, [1999] 2 F.C. 476, 236 N.R. 317 that judicial review is available in relation to "any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*": at para. 21.

[62] As the Federal Court of Appeal observed in *Air Canada v. Toronto Port Authority*, 2011 FCA 347, 426 N.R. 131, subsection 18.1(3) refers to relief being available "for an 'act or thing,' a failure, refusal or delay to do an 'act or thing,' a 'decision,' an 'order' and a 'proceeding.'"

Citing Rule 300 of the *Federal Courts Rules*, the Court noted that "the rules that govern applications for judicial review apply to 'applications for judicial review of administrative action,' not just applications for judicial review of 'decisions or orders'": at para. 24

[63] The Minister's February 15, 2012 letter advises GMCL that its calculation of Program Employees' taxable benefits for the 2008 taxation year had not been done correctly. The letter further sets out the Minister's expectation that "in the future GMCL will comply with the requirements of the *Income Tax Act* …".

[64] As an employer, GMCL has a statutory obligation to keep records, calculate the value of the taxable benefits received by its employees, make source deductions and remit the appropriate amounts to the CRA. Failure to do so constitutes an offence under the *Income Tax Act* and could expose GMCL to penalties: see section 238.

[65] GMCL's Notice of Application states that it has relied upon the specific guidance provided by the 1982 formula which had been agreed to by Revenue Canada and that it had done so to its detriment. If I were to decide this issue on a purely preliminary basis, these facts would be presumed to be true.

[66] However, because the motion was heard in conjunction with the merits of the application, the Court is in possession of all of the relevant facts pertaining to this issue, including a record of the correspondence between GMCL and the CRA leading up to the Minister's February 15, 2012

letter. As a result, I once again prefer to address this issue, not as a preliminary motion, but as a substantive challenge to the application, in the context of the record as a whole.

[67] From this, it is apparent that the Minister's February 15, 2012 letter could have real consequences for GMCL in carrying out its statutory responsibilities. It "affect[s] legal rights, impose[s] legal obligations, or cause[s] prejudicial effects": *Air Canada*, above at para. 29.

[68] That is not, however, the end of the matter. As noted above, the Federal Court of Appeal made it clear in the *Krause* case that judicial review will be available, not just in relation to any matter, but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*. As will be explained below, I am not persuaded that the remedy sought by GMCL is one that is available to it from this Court under section 18 of the *Federal Courts Act*.

iii) Is the Relief Sought by GMCL Available in this Court?

[69] In its Notice of Application, GMCL identifies the remedies that it is seeking as being:

1. a writ of *certiorari* quashing the "Decision", namely the determination communicated to GMCL in the Minister's letter of February 12, 2012, that it had failed to properly calculate the taxable automobile benefits for its Program Employees for the 2008 taxation year;

2. a writ of prohibition prohibiting the Minister from assessing Program Employees for tax, interest and/or penalties for the 2008 taxation year; and

3. a declaration that any assessments issued by the Minister to Program Employees for the 2008 taxation year on the basis of the Decision are invalid and unenforceable.

[70] Citing cases including the Federal Court of Appeal's decisions in *Domtar Inc. v. Canada*, 2009 FCA 218, 392 N.R. 200 and *Canada v. Roitman*, 2006 FCA 266, 353 N.R. 75, the Minister submits that in determining whether the relief sought by GMCL is available in this Court, regard must be had to the essential nature of GMCL's claim, having "a realistic appreciation of the practical result sought by the claimant": *Domtar*, at para. 28.

[71] The Minister submits that GMCL's application for judicial review is in reality a disguised attempt to have the Minister's tax reassessments set aside, and that this Court does not have the power to grant declaratory relief preventing the Minister from carrying out her statutory duties under the *Income Tax Act* simply because doing so may "impose unfair and onerous obligations and financial hardships" on the taxpayer: *Canada (Revenue Agency) v. Tele-Mobile Company Partnership et al.*, 2011 FCA 89, 417 N.R. 261 at para. 5.

[72] GMCL accepts that tax cases should generally be pursued through the appeals process established in the *Income Tax Act*, and that the Supreme Court of Canada has held that "[j]udicial 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": *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793 at para. 11.

[73] GMCL contends, however, that the Supreme Court did not completely foreclose the possibility of judicial review proceedings ever being available in tax matters. It notes that the Court expressly stated that "[j]udicial review is available, provided the matter is not otherwise appealable. It is also available to control abuses of power, including abusive delay". The Court further observed that "[f]act-specific remedies may be crafted to address the wrongs or problems raised by a particular case": *Addison & Leyen*, above at para. 8.

[74] Citing *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79 at para. 75, and *Main Rehabilitation Co. v. Canada*, 2004 FCA 403, 329 N.R. 248 at para. 7, GMCL submits that the Tax Court can only determine whether the Minister's assessment was right or wrong: it cannot review the process that was followed or the Minister's actions in determining the reassessment.

[75] According to GMCL, it is not challenging the *correctness* of its employees' tax assessments, but rather the *process* that was followed by the Minister in arriving at these assessments. This, it says, is properly the subject of a judicial review application before the Federal Court: *Chrysler Canada Inc. v. Canada*, 2008 FC 727, 329 F.T.R. 260, aff'd 2008 FC 1049, 2008 D.T.C. 6654. Moreover, GMCL submits that such a claim is quite distinct from the right to appeal a tax assessment to the Tax Court: *Ereiser v. Canada*, 2013 FCA 20, 2013 D.T.C. 5036 at paras. 37-38, (leave to appeal dismissed [2013] S.C.C.A. No. 167).

[76] GMCL refers to subsection 152 (4) of the *Income Tax Act*, which provides, in part, that the Minister "may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer ….". Noting the use of the word "may" in this provision, GMCL submits that the Minister has discretion as to whether or not to reassess, which discretion is reviewable in this Court.

[77] According to GMCL, the essence of its application for judicial review relates to the Minister's discretionary decision to "retroactively rescind the Directions" given in 1982. GMCL notes that it is not one of the affected taxpayers with the result that it has no right of appeal to the Tax Court. As a consequence, GMCL says that the statutory bar contained in section 18.5 of the Federal Courts Act does not apply to its application.

[78] Moreover, given that the case involves the review of the exercise of Ministerial discretion, GMCL says that its application is properly before this Court: *Addison & Leyen*, above at para. 8.

[79] I would start my analysis by observing that to the extent that GMCL seeks to prohibit the Minister from assessing Program Employees for tax, interest and/or penalties in relation to their taxable benefits for the 2008 taxation year, that request appears to be moot, given my understanding that these assessments have already been issued.

[80] More fundamentally, however, I am satisfied that what GMCL seeks in its Notice of Application is to prevent the Minister from carrying out her statutory responsibility to assess taxes in accordance with the law. Such relief is not available in this Court.

[81] Subsection 152(8) of the *Income Tax Act* provides that an assessment shall "be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto", subject only to being varied or vacated through the tax appeal process under that Act. The Federal Court is not permitted to vary, set aside or vacate income tax assessments: *JP Morgan* at para. 93; *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46, [2008] 2 S.C.R. 643 at paras. 28 and 58.

[82] It is true that in *Addison & Leyen*, the Supreme Court did not completely foreclose the possibility of judicial review proceedings ever being available in tax matters. However, as the Federal Court of Appeal observed in *JP Morgan*, "these remedies cannot be used to make the Minister act contrary to statute or to refrain from acting under statute where she must act": at para. 94.

[83] The jurisprudence also teaches that judges must "look beyond the words used, the facts alleged and the remedy sought and ensure … that the statement of claim [or Notice of Application] is not a disguised attempt to reach before the Federal Court a result otherwise unreachable in that Court": *Roitman*, above at para. 16.

[84] In ascertaining an application's essential character, the Notice of Application is read "holistically and practically": *JP Morgan*, above at para. 50. See also *Sifto Canada Corp. v. Minister of National Revenue*, 2013 FC 986, at para. 21.

[85] When GMCL's Notice of Application is read "holistically and practically", it is apparent that what it seeks to do is prevent the Minister from carrying out her statutory duty to assess the value of the tax payable by GMCL's Program Employees on account of the taxable benefits they received from their employer through the provision of company cars.

[86] Lest there be any doubt about that, it is only necessary to have regard to paragraph 1(c) of GMCL's Notice of Application, where it seeks a declaration that "any assessments issued by the Minister to Program Employees for the 2008 taxation year on the basis of the Decision are invalid and unenforceable". In essence, GMCL seeks to have these assessments quashed. This is not a remedy that this Court can grant.

iv) No Cognizable Administrative Law Claim

[87] Although this argument was not initially framed in these terms, the Minister contends that GMCL's Notice of Application fails to raise a "cognizable administrative law claim", as that term has since been used by the Federal Court of Appeal in *JP Morgan*. I agree.

[88] While GMCL accepts that it was open to the CRA to re-evaluate the situation in 2012 and to adopt a different approach to the calculation of automobile-related taxable benefits on a going-forward basis, it says in light of the agreement regarding the use of the 1982 formula, the

Minister should be estopped from reassessing those benefits, using a different formula, on a retrospective basis. This is not, however, a cognizable administrative law claim.

[89] This type of claim was discussed at length by the Federal Court of Appeal in *JP Morgan*: see, in particular, paras. 75-80. The Court observed that "changes in policies or departures from policies, by themselves, do not constitute an abuse of discretion or make a decision unreasonable". This is because the Minister is "bound to apply the law of the land, not [her] administrative policies, to the facts before [her]". By way of example, the Court held that "in the tax context, information bulletins do not create estoppels": *JP Morgan* at para. 75.

[90] By analogy, the Minister's determination that the calculation method specified in the 1982 formula was no longer appropriate as it did not properly ascertain the true value of the taxable benefits enjoyed by GMCL's Program Employees does not constitute an abuse of her discretion. Indeed no such abuse is alleged in GMCL's Notice of Application.

[91] As the Federal Court of Appeal observed in *JP Morgan*, "the Minister generally has no discretion to exercise and, indeed, no discretion to abuse". That is, "[w]here the facts and the law demonstrate liability for tax, the Minister must issue an assessment: at para. 77, citing *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 at p. 602, 2 N.R. 324 (F.C.A.). Moreover, as was noted earlier, this Court cannot prevent the Minister from carrying out her duty: *JP Morgan* at para. 78.

[92] Indeed, neither GMCL nor Mr. Szymczyk has suggested in their Notices of Application that the reassessments at issue were not reasonable, or that they had not been carried out in accordance with the law.

[93] If the Minister has erred in her assessment of the Program Employees' tax liability, it is open to those employees to challenge their assessments in the Tax Court. That does not, of course, address GMCL's concerns.

[94] Indeed, I have accepted that GMCL has been directly affected by the decision underlying this application in a manner that it is sufficient to give it standing to bring its application for judicial review. However, inasmuch as the increased administrative burden on GMCL results from the discharge of its statutory obligations under the *Income Tax Act*, it is an unfortunate cost of doing business.

[95] To the extent that GMCL may be of the view that the Minister's repudiation of the 1982 formula without advance notice constitutes wrongful or reprehensible conduct (allegations that have not been advanced in its Notice of Application), it is not necessarily without a remedy. The Federal Court of Appeal has made it clear that in such cases "adequate and effective recourses may be available by means other than an application for judicial review in the Federal Court": *JP Morgan*, above at para. 89.

Conclusion

[96] For these reasons, I am satisfied that the relief sought by GMCL is not available in this Court. I am further satisfied that GMCL's Notice of Application fails to raise a "cognizable administrative law claim", as that term was used by the Federal Court of Appeal in *JP Morgan*. As a consequence, GMCL's application for judicial review will be dismissed.

[97] The next issue to be addressed is the Minister's motion to strike Mr. Szymczyk's application for judicial review.

C. The Motion to Strike Mr. Szymczyk's Application for Judicial Review

[98] It will be recalled that Mr. Szymczyk's application for judicial review challenges "a decision of the Minister of National Revenue … to issue a reassessment dated April 6, 2012 on the basis that [GMCL] had failed to properly determine the 'reasonable standby charge' and the 'automobile operating expense benefit' under section 6 of the *Income Tax Act* … for the applicant's 2008 taxation year …".

[99] By way of relief, Mr. Szymczyk's Notice of Application seeks "a declaration that the reassessment issued by the Minister to [him] on April 16, 2012 for the 2008 taxation year is invalid and unenforceable".

[100] The Minister contends that Mr. Szymczyk's application should be struck as he has a right of appeal to the Tax Court of Canada, which has exclusive jurisdiction to deal with the issues

raised by his application for judicial review. Indeed, Mr. Szymczyk has already commenced the appeals process having filed a Notice of Objection in relation to his 2008 tax reassessment.

[101] The Minister further asserts that Mr. Szymczyk's 2008 income tax reassessment is not a "decision" that is amenable to judicial review.

[102] Finally, the Minister contends that the Federal Court does not have the power to vacate a tax assessment or to or declare it to be invalid or unenforceable.

[103] I do not need to address the Minister's first two arguments, as I am satisfied that this Court does not have the power to grant the relief sought by Mr. Szymczyk.

Why the Relief Sought by Mr. Szymczyk is not Available in this Court

[104] The Minister submits that even though Mr. Szymczyk purports to be attacking the Minister's decision to reassess (as opposed to the reassessment itself), his application for judicial review is in essence, an attack on the tax reassessment itself. I agree. Trying to separate the decision to reassess from the reassessment itself is a meaningless exercise: *Roitman*, above, at para. 25.

[105] I would also note that the claim advanced in *JP Morgan* appears to have been framed in similar terms – that is, as a challenge to the decision to reassess rather than an attack on the actual assessments: see para. 10. Nevertheless, the Federal Court of Appeal was satisfied that the

application for judicial review at issue in that case was, in reality, an attack on the assessments themselves.

[106] The real nature of Mr. Szymczyk's claim is, moreover, revealed by the relief that he is seeking which relates to the reassessment itself, and not the Minister's decision to reassess. That is, Mr. Szymczyk's Notice of Application seeks a declaration "that the reassessment issued by the Minister to him on April 16, 2012 for the 2008 taxation year is invalid and unenforceable".

[107] I agree with the Minister that if this Court were to grant Mr. Szymczyk the relief that he seeks, it would have the same practical effect as if the Court were to vacate the tax assessment. As was explained earlier in these reasons, this is clearly not relief that the Federal Court is competent to grant: *JP Morgan*, above at para. 93.

[108] Given that Mr. Szymczyk's Notice of Application seeks only a remedy that cannot be granted by this Court, it follows that it must be struck: *JP Morgan*, above at para. 92.

[109] As was noted earlier, if Mr. Szymczyk takes issue with the amount of his reassessment for the 2008 taxation year, it remains open to him to pursue his objection through the appeals process established under the *Income Tax Act*.

[110] I am aware that Mr. Szymczyk argues that what is at issue in his application is not the *amount* of his tax reassessment, but rather the *process* whereby that reassessment was carried out.

[111] That is, Mr. Szymczyk does not dispute that it was open to the Minister to revisit the 1982 formula and to determine that the methodology prescribed by that formula did not conform to the requirements of the *Income Tax Act*. It was also admittedly open to the Minister to provide new directions as to how the taxable automobile benefits received by GMCL's Program Employees (including Mr. Szymczyk) should be calculated in the future.

[112] What Mr. Szymczyk says that he is challenging in his Notice of Application is the Minister's change of position, after the fact, with respect to the methodology to be used by GMCL in calculating the value of the taxable benefits received by Program Employees. He contends that the Minister's agreement to the use of the 1982 formula, the acceptance by the Minister of taxable benefits being calculated in accordance with that formula over a period of some 25 years, and the reliance of GMCL and its employees on the Minister's conduct, give rise to an estoppel which should preclude the Minister from being able to resile from the agreement to the 1982 formula without first providing fair notice to GMCL and its employees.

[113] In support of this argument, Mr. Szymczyk asserts that he had relied on the Minister's acceptance of the 1982 formula to his detriment. Notwithstanding his statutory obligations under subsection 230(1) of the *Income Tax Act*, Mr. Szymczyk says that he did not keep records regarding his own individual vehicle use because he understood that the Minister would rely upon the 1982 formula in valuing Program Employees' taxable benefits. As a consequence, he contends that he is not now in a position to be able to challenge the Minister's assessment of the value of his taxable automobile benefits.

[114] To buttress his position that this is a claim that can be advanced in the Federal Court, Mr. Szymczyk relies on the decision of the Federal Court of Appeal in *Ereiser*, above. In that case the Federal Court of Appeal held that "[t]here is also some potential for an administrative law remedy where the conduct complained of represents an abuse of discretionary authority on the part of a tax official, particularly if recourse to the Tax Court of Canada is not possible or would not afford an adequate remedy": at para. 37.

[115] Mr. Szymczyk contends that he cannot advance his estoppel argument in the Tax Court, as the argument is based upon an equitable principle, and the Tax Court is not a Court of equity. It has no inherent jurisdiction, and is limited to the jurisdiction conferred by its enabling statute, the *Tax Court of Canada Act* R.S.C., 1985, c. T-2: *Chaya v. Canada*, 2004 FCA 327, 2004 D.T.C. 6676, at para. 4, *Darte v. Canada*, [2008] T.C.J. No. 35. Indeed, the Minister does not dispute that the Tax Court does not have equitable jurisdiction.

[116] Be that as it may, Mr. Szymczyk is not left without a remedy.

[117] Indeed, Mr. Szymczyk can pursue his appeal through to the Tax Court, if necessary. While he may not have detailed written records regarding his vehicle use in 2008, the Tax Court can receive oral testimony from Mr. Szymczyk regarding his reconstructed assessment of his vehicle use, based upon his personal recollection and documents such as his appointment calendar, expense reports and credit card receipts. It is, moreover, open to the Tax Court to decide how much weight should be ascribed to Mr. Szymczyk's estimate of his personal vehicle

use, in light of all of the surrounding circumstances, including his reliance upon the 1982 formula as an explanation for his failure to keep records.

[118] If the Tax Court determines that the Minister has correctly calculated the value of the taxable benefits that Mr. Szymczyk had received in connection with his use of company cars, the Minister's conduct cannot serve to relieve him of his statutory obligation to pay: *Webster v. Canada*, 2003 FCA 388, 312 N.R. 236, at para. 21; *Addison & Leyen Ltd. v. Canada*, 2006 FCA 107, [2006] 4 F.C.R. 532 (F.C.A.), at para. 68.

[119] Although I understand that no penalties have been assessed in this case, the Minister's conduct may also be taken into account in determining whether Mr. Szymczyk should be afforded relief against any assessment of interest under subsection 220(3.1) of the *Income Tax Act*: *JP Morgan*, above at para. 90.

D. Conclusion

[120] For these reasons, both applications for judicial review are dismissed. Each party shall have 10 days in which to make brief submissions on the issue of costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. these applications for judicial review are dismissed;

2. each party shall have 10 days in which to make brief submissions on the issue of costs; and

3. a copy of these reasons shall be placed on Court Files T-437-12 and T-967-12.

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS: T-437-12 AND T-967-12

DOCKET:	T-437-12
STYLE OF CAUSE:	GENERAL MOTORS OF CANADA LIMITED v MINISTER OF NATIONAL REVENUE
AND DOCKET:	T-967-12
STYLE OF CAUSE:	RICHARD SZYMCZYK v MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 10, 2013 AND SEPTEMBER 11, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	MACTAVISH J.
DATED:	DECEMBER 5, 2013

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