

Federal Court of Appeal



Cour d'appel fédérale

**Date: 20100217**

**Docket: A-280-09**

**Citation: 2010 FCA 50**

**CORAM: SEXTON J.A.  
EVANS J.A.  
SHARLOW J.A.**

**BETWEEN:**

**ROBERT KUBBERNUS**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on February 17, 2010.

Judgment delivered from the Bench at Toronto, Ontario, on February 17, 2010.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

Federal Court of Appeal



Cour d'appel fédérale

**Date: 20100217**

**Docket: A-280-09**

**Citation: 2010 FCA 50**

**CORAM: SEXTON J.A.  
EVANS J.A.  
SHARLOW J.A.**

**BETWEEN:**

**ROBERT KUBBERNUS**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Toronto, Ontario, on February 17, 2010)**

**SHARLOW J.A.**

[1] This is an appeal from a judgment of Justice Angers of the Tax Court of Canada (2009 TCC 311) granting the Crown's motion to quash an appeal commenced by the appellant to challenge a reassessment made under the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) on October 16, 2006 in relation to the 2000 taxation year.

[2] The only issue in this appeal is whether the 2006 reassessment was made under subsection 152(4.2) of the *Income Tax Act* as contended by the Crown, or subparagraph 152(4)(b)(i) as contended by the appellant. It is common ground that if the Crown is correct on this point, this appeal cannot succeed because the right to object is barred by subsection 165 (1.2), and therefore no appeal to the Tax Court of Canada is possible.

[3] It is undisputed that the 2006 reassessment granted a request by the appellant. However, the record does not disclose whether the request was made orally or in writing, or the statutory provision upon which the appellant relied to persuade the Minister that he had the authority to reassess after the normal reassessment period.

[4] The only documentary evidence about the request itself is found in a document attached to the affidavit of Agnes Predota sworn March 5, 2009, submitted by the appellant (Appeal Book, page 195). The document appears to be a paper copy of a computer record that the appellant obtained from the Canada Revenue Agency pursuant to a formal request for access to information. The document refers to a request received on June 29, 2006 from the appellant apparently seeking a correction to a “capital loss”, which request was approved on September 11, 2006.

[5] The only statutory provisions referred to in the note are subsections 152(4.2) and 164(1.5). Subsection 152(4.2) gives the Minister the discretion to reassess outside the normal reassessment period at the taxpayer’s request. It reads in relevant part as follows:

152. (4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining, at any time after the end of the normal reassessment period of a taxpayer who is an individual [...] the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is ten calendar years after the end of that taxation year,

(a) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year [...].

152. (4.2) Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable [...] pour une année d'imposition le remboursement auquel le contribuable a droit à ce moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année en vertu de la présente partie, le ministre peut, si le contribuable demande pareille détermination au plus tard le jour qui suit de dix années civiles la fin de cette année d'imposition, à la fois :

a) établir de nouvelles cotisations concernant l'impôt, les intérêts ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie [...].

Subsection 164(1.5) authorizes the Minister to refund tax where a reassessment is made under subsection 152(4.2).

[6] The notice of reassessment indicates that the reassessment allowed a capital loss carry forward of \$545. There is no reference in the notice of reassessment to any other capital loss or any loss carry back, or any other adjustment to income or taxable income. The notice of reassessment contains the following passage:

As you requested, we have adjusted your return. In the past, you had to make such a request within three years of the date we mailed you the "Notice of Assessment" for that return. However, the fairness provisions of the "Income Tax Act" allow us to make adjustments beyond the usual three year period. Since we allowed you an adjustment under these provisions, you cannot file a "Notice of Objection" regarding this reassessment.

We have allowed a carryforward of \$545 of your capital loss.

[7] The fairness provisions referred to in this note are a group of provisions in the *Income Tax Act* that give the Minister the discretion to provide certain forms of tax relief. The Crown argues that the particular fairness provision applicable in this case is subsection 152(4.2), referred to above. That is the only fairness provision that can possibly apply.

[8] The appellant argues that the 2006 reassessment was not made under subsection 152(4.2) of the *Income Tax Act*, but rather was made under subparagraph 152(4)(b)(i). The combined effect of that provision and subsection 152(6) is to extend the permitted reassessment period from three to six years where a reassessment is required to give effect to a request for a loss carry back. Thus, the position of the appellant is based on the premise that the 2006 reassessment was a response to his request for a reassessment that would apply to 2000 a loss carried back from a subsequent year. Subparagraph 152(4)(b)(i) and subsection 152(6) read in relevant part as follows:

152. (4) 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 or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

[...]

(b) the assessment, reassessment or

152. (4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :

[...]

b) la cotisation est établie avant le jour

additional assessment is made before the day that is 3 years after the end of the normal reassessment period for the taxpayer in respect of the year and

qui suit de trois ans la fin de la période normale de nouvelle cotisation applicable au contribuable pour l'année et, selon le cas :

(i) is required pursuant to subsection 152(6) or would be so required if the taxpayer had claimed an amount by filing the prescribed form referred to in that subsection on or before the day referred to therein [...].

(i) est à établir en conformité au paragraphe (6) ou le serait si le contribuable avait déduit un montant en présentant le formulaire prescrit visé à ce paragraphe au plus tard le jour qui y est mentionné [...].

[...]

[...]

152. (6) Where a taxpayer has filed for a particular taxation year the return of income required by section 150 and an amount is subsequently claimed by the taxpayer or on the taxpayer's behalf for the year as

152. (6) Lorsqu'un contribuable a produit la déclaration de revenu exigée par l'article 150 pour une année d'imposition et que, par la suite, une somme est demandée pour l'année par lui ou pour son compte à titre de :

[...]

[...]

(c) a deduction [...] under section 111 in respect of a loss for a subsequent taxation year,

c) déduction, [...] en application de l'article 111, relativement à une perte subie pour une année d'imposition ultérieure;

[...]

[...]

by filing with the Minister, on or before the day on or before which the taxpayer is, or would be if a tax under this Part were payable by the taxpayer for that subsequent taxation year, required by section 150 to file a return of income for that subsequent taxation year, a prescribed form amending the return, the Minister shall reassess the taxpayer's tax for any relevant taxation year (other than a taxation year preceding the particular taxation year) in order to take into account the deduction claimed.

en présentant au ministre, au plus tard le jour où le contribuable est tenu, ou le serait s'il était tenu de payer de l'impôt en vertu de la présente partie pour cette année d'imposition ultérieure, de produire en vertu de l'article 150 une déclaration de revenu pour cette année d'imposition ultérieure, un formulaire prescrit modifiant la déclaration, le ministre doit fixer de nouveau l'impôt du contribuable pour toute année d'imposition pertinente (autre qu'une année d'imposition antérieure à l'année donnée) afin de tenir compte de la déduction demandée.

[9] Justice Angers concluded that the 2006 reassessment was made under subsection 152(4.2). That conclusion was reasonably open to him on the record. Indeed, it was the only conclusion that was reasonably open to him on the record. There are documents from which it might reasonably be inferred that the reassessment was made under subsection 152(4.2), namely the notice of reassessment and the computer record described above. However, there is no evidence that the 2006 reassessment was made to give effect to any request relating to a loss carry back pursuant to subsection 152(6). It follows that there is no evidence to support the contention of the appellant that the 2006 reassessment was made under subparagraph 152(4)(b)(i).

[10] Even if the reassessment had been made under subparagraph 152(4)(b)(i) as contended by the appellant, we agree with the conclusion of Justice Angers that the issues raised in the proposed appeal are not reasonably related to the adjustment made in the 2006 reassessment, i.e., the deduction of the \$545 capital loss carry forward. The issues the appellant raises in his appeal cannot be entertained because of the limitation in subsection 169(2) of the *Income Tax Act*.

[11] For these reasons, the appeal will be dismissed with costs.

“K. Sharlow”

---

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-280-09

**(APPEAL FROM A JUDGMENT OF THE HONOURABLE FRANÇOIS ANGERS OF  
THE TAX COURT OF CANADA DATED JUNE 29, 2009, DOCKET NO. 2008-3239 (IT) G)**

**STYLE OF CAUSE:** ROBERT KUBBERNUS v. HER  
MAJESTY THE QUEEN

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 17, 2010

**REASONS FOR JUDGMENT OF THE COURT BY:** (SEXTON, EVANS & SHARLOW  
J.J.A.)

**DELIVERED FROM THE BENCH BY:** SHARLOW J.A.

**APPEARANCES:**

A. Christina Tari FOR THE APPELLANT

Marie Thérèse-Boris FOR THE RESPONDENT  
Justin Kutyan

**SOLICITORS OF RECORD:**

Richler and Tari, Tax Lawyers FOR THE APPELLANT  
Toronto, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Toronto, Ontario