Federal Court of Appeal

Cour d'appel fédérale

Date: 20130204

Docket: A-201-11

Citation: 2013 FCA 20

CORAM: **SHARLOW J.A.**
PELLETIER J.A.
MAINVILLE J.A.

BETWEEN:

RONALD EREISER

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on October 29, 2012.

Judgment delivered at Ottawa, Ontario, on February 4, 2013.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: PELLETIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] This is an appeal and a cross-appeal from an unreported interlocutory judgment of Justice Hershfield of the Tax Court of Canada in relation to the appeal of Ronald Ereiser from reassessments under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp). The judgment allows in part the Crown's motion to strike numerous paragraphs of Mr. Ereiser's amended notice of appeal filed October 29, 2010. For the reasons that follow, I would dismiss the appeal and the cross appeal.

Summary of factual allegations in the notice of appeal

[2] I summarize as follows the factual allegations in the notice of appeal. For the purpose of this appeal, these allegations must be assumed to be true even though they have not been proven. The Crown has not yet filed a defence.

[3] The taxation years in issue are the years 1996 to 1998. Throughout that period, Mr. Ereiser carried on a business called "Kerrobert Satellite and Cellular". He kept good business records and retained qualified accountants to prepare his financial statements and tax returns. In those tax returns, Mr. Ereiser reported gross and net business income in 1996 of approximately $878,000 and $68,000, in 1997 of approximately $509,000 and $20,000, and in 1998 of approximately $258,000 and $34,000. The net business income reported did not reflect additional expenses he incurred in those years and could have claimed as deductions. His returns for 1996 and 1997 were filed in 1998, and his return for 1998 was filed in 1999.

[4] In October of 2003, an "investigator" (that is, an official with the criminal investigations division of the Canada Revenue Agency) sent Mr. Ereiser a letter proposing to reassess Mr. Ereiser for 1996, 1997 and 1998 to add income totalling approximately $1.7 million, and to assess gross negligence penalties. The proposal letter stated that Mr. Ereiser's file would be forwarded to the Department of Justice with a recommendation to pursue a prosecution.

[5] No criminal prosecution was ever commenced. Nevertheless, various investigators used the threat of assessments in the amounts mentioned above to attempt to coerce Mr. Ereiser to plead guilty to criminal charges. Specifically they offered, if Mr. Ereiser would plead guilty to criminal

charges, to reassess in lesser amounts so that his total liability would be approximately $80,000. That amount of tax liability over the three taxation years in issue represents income of approximately $28,000 per year.

[6] In November of 2006, the investigator who wrote the proposal letter acknowledged in writing that it contained errors, specifically that the amounts would have to be adjusted to reflect "costs of sales of cards" and "incorrectly assessed diary entries". At that time, Mr. Ereiser was told to plead guilty and take the deal or the proposed reassessments would be processed. Mr. Ereiser did not wish to plead guilty and did not do so.

[7] On January 17, 2008, the Minister reassessed Mr. Ereiser for 1996, 1997 and 1998. The reassessment was consistent with the proposal letter and did not correct the errors noted in November of 2006. Mr. Ereiser denies that he had unreported income in the amounts assessed.

[8] The officials responsible for the reassessment were the investigators. There was never any separation between the investigative and audit functions of the Canada Revenue Agency. The reassessments are based on evidence obtained by the investigators in breach of Mr. Ereiser's rights under the *Canadian Charter of Rights and Freedoms*.

[9] Mr. Ereiser filed notices of objection on April 14, 2008. While those objections were before an appeals officer, investigators continued to assert, falsely, that Mr. Ereiser was under criminal investigation for 1996, 1997 and 1998. They so informed the appeals officer dealing with the objections, despite protests made on behalf of Mr. Ereiser that this would impede the impartiality of

the appeals officer. Later the investigators acknowledged that there was no criminal investigation, but the objections were not assigned to a different appeals officer.

[10] Because the investigators would have agreed to reassess on the basis of lower income amounts if Mr. Ereiser had agreed to plead guilty, and because an investigator had agreed that the proposal letter had errors, the reassessments cannot have been based on any factual assumption by the Minister that Mr. Ereiser had unreported income in the amounts stated in the proposal letter.

[11] Paragraphs 36 and 37 of the notice of appeal state that Mr. Ereiser did not earn net income as reassessed and did not make any misrepresentations in his income tax returns for the years in issue. For the purposes of this appeal, I have treated those statements as denials by Mr. Ereiser of the apparent factual basis of the reassessments. In my view, that is appropriate although the denials appear under the heading "Reasons Relied Upon".

Issues stated in the notice of appeal

[12] Paragraphs 26 to 30 of the notice of appeal set out the grounds upon which Mr. Ereiser challenges the reassessments. I summarize those grounds of appeal as follows:

(a) The reassessments should be vacated because they were issued as the result of misfeasance in public office on the part of the investigators. The misfeasance in public office was the authorization of a grossly inflated reassessment to coerce a guilty plea to a criminal charge.

(b) In the alternative, the reassessments should be vacated because each of them was made outside the normal reassessment period for the relevant year, and the Minister cannot prove by admissible evidence that the normal reassessment period did not apply.

(c) In the further alternative, the reassessments should be vacated because Mr. Ereiser did not have unreported income in 1996, 1997 or 1998.

The Crown's motion to strike

[13] The Crown filed a notice of motion in the Tax Court of Canada seeking an order striking numerous paragraphs from the notice of appeal. The Crown's motion, if granted, would have removed any challenge to the income inclusions for 1996, 1997 and 1998 as pleaded, leaving only a challenge to the assessed penalties.

[14] The Crown relied for its motion on Rule 53 and Rule 58(1)(*b*) of the *Rules of the Tax Court of Canada (General Procedure)*, SOR/90-688a. Those provisions read in relevant part as follows:

53. The Court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,	**53**. La Cour peut radier un acte de procédure ou un autre document ou en supprimer des passages, en tout ou en partie, avec ou sans autorisation de le modifier parce que l'acte ou le document :
(*a*) may prejudice or delay the fair hearing of the action,	*a*) peut compromettre ou retarder l'instruction équitable de l'appel;
(*b*) is scandalous, frivolous or vexatious, or	*b*) est scandaleux, frivole ou vexatoire;
(*c*) is an abuse of the process of the Court.	*c*) constitue un recours abusif à la Cour.
…	[…]

58. (1) A party may apply to the Court, …	**58**. (1) Une partie peut demander à la Cour, […]
(*b*) to strike out a pleading because it discloses no reasonable grounds for appeal or for opposing the appeal,	*b*) soit de radier un acte de procédure au motif qu'il ne révèle aucun moyen raisonnable d'appel ou de contestation de l'appel,
and the Court may grant judgment accordingly.	et la Cour peut rendre jugement en conséquence.
(2) No evidence is admissible on an application, …	(2) Aucune preuve n'est admissible à l'égard d'une demande, […]
(*b*) under paragraph (1)(b).	*b*) présentée en vertu de l'alinéa (1)*b*).

[15] Justice Hershfield granted the Crown's motion only in part. His order lists which paragraphs of the notice of appeal are to be struck, not struck, or amended as stated. The transcript of the hearing of the Crown's motion discloses that both parties made submissions on each paragraph of the notice of appeal that was the subject of the Crown's motion to strike. There are no separate written reasons. Justice Hershfield gave oral reasons in the course of the hearing and included the following recitals in the judgment:

> And having provided Oral Reasons during the hearing of the [Crown's] motion for striking, not striking or amending a particular part of the [notice of appeal] as each such part was addressed by the parties which Reasons included amongst other things:
>
> > A rejection of [Mr. Ereiser]'s argument that this Court has jurisdiction, inherent or otherwise, to deal with procedural matters leading up to an assessment, namely misfeasance [in] public office, given that it is a statutory Court charged by section 171 of the *Income Tax Act* (Canada) (the *"Act"*) to determine the correctness of an assessment and given that it is plain and obvious that, based on the authorities, this line of argument cannot be successful in this Court;
> >
> > A rejection of [Mr. Ereiser]'s argument that any exceptions to such description of this Court's jurisdiction such as providing a remedy under the *Charter of Rights and Freedoms* (Canada) or allowing evidence affecting

> which party has an onus of proof, apply to assertions of malfeasance on the part of officers of the Canada Revenue Agency ("CRA"); and
>
> Without barring the raising of the issue at trial, a rejection of the [Crown]'s argument that a plea bargain offered by the [Crown] on a criminal prosecution was privileged as being a "without prejudice" settlement communication, based on the criminal prosecution, as a distinct proceeding, not being a settlement offer in respect of the present appeal and on the public policy considerations that are the basis for extending privilege to settlement discussions not extending to protecting plea bargain evidence where same, as argued by [Mr. Ereiser], might reasonably be seen as reflecting a threat not an offer and where such evidence may, as asserted by [Mr. Ereiser], be relevant to an onus of proof issue….

Standard of review

[16] The decision of a judge to grant or refuse a motion to strike is discretionary. This Court will defer to such a decision on appeal in the absence of an error of law, a misapprehension of the facts, a failure to give appropriate weight to all relevant factors, or an obvious injustice: see, for example, *Collins v. Canada*, 2011 FCA 140 at paragraph 12, *Domtar Inc. v. Canada*, 2009 FCA 218 at paragraph 24, *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374 at paragraph 15, *Elders Grain Co. v. M.V. Ralph Misener (The)*, 2005 FCA 139, [2005] 3 F.C.R. 367 at paragraph 13, *Mayne Pharma (Canada) Inc. v. Aventis Pharma Inc.*, 2005 FCA 50 at paragraph 9.

Analysis

(1) Test for striking pleadings

[17] There is no dispute as to the test for striking pleadings. It was recently restated by Chief Justice McLachlin, writing for the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at paragraph 17:

> … A claim will only be struck if it is plain and obvious**,** assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action:

> *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

See also, for example, *Main Rehabilitation Co. v. Canada*, 2004 FCA 403 at paragraph 3, *Roitman v. Canada*, 2006 FCA 266 at paragraph 15, *Domtar* (cited above) at paragraph 21.

(2) Appeal by Mr. Ereiser

[18] Mr. Ereiser's principal ground of appeal is that the reassessments should be vacated because they were issued as the result of misfeasance in public office on the part of the investigators. The specific misfeasance alleged by Mr. Ereiser is the authorization of a grossly inflated reassessment to coerce a guilty plea to a criminal charge. The Crown sought to strike the provisions of the notice of appeal relating to this point. The Crown's position, which Justice Hershfield accepted, is that the authorization of a grossly inflated reassessment to coerce a guilty plea to a criminal charge is not a basis upon which the Tax Court of Canada can vacate an assessment. Mr. Ereiser submits that the Crown's argument should have been rejected.

[19] As I understand the position of Mr. Ereiser, it is based on three propositions. The first proposition is that the Tax Court of Canada has the jurisdiction (that is, the legal authority) to vacate an income tax assessment that is properly before it on an appeal. It is undisputed that this proposition is correct. The second proposition is that it is misfeasance in public office for a tax official to authorize an income tax assessment in an inflated amount as a means of coercing an

admission of criminal liability. This proposition is unchallenged by the Crown. For the purpose of this appeal I will assume without deciding that it is correct.

[20] The controversy relates to the third proposition underlying the position of Mr. Ereiser, which is that the Tax Court of Canada can and should vacate an assessment if it was authorized by a tax official in circumstances amounting to misfeasance in public office. Justice Hershfield found this proposition to be incorrect. I agree with Justice Hershfield on this point. I also agree that it necessarily follows that Mr. Ereiser's principal ground of appeal cannot possibly succeed. I conclude that Justice Hershfield made no error warranting the intervention of this Court when he granted the Crown's motion to strike the provisions of the notice of appeal relating to that ground of appeal. My reasons for that conclusion are set out below.

[21] Mr. Ereiser is seeking from the Tax Court of Canada an order vacating the reassessments under appeal. That is the appropriate remedy in an income tax appeal for an assessment (including a reassessment) that is found not to be valid, or that is found not to be correct. I use the term valid to describe an assessment made in compliance with the procedural provisions of the *Income Tax Act*, and correct to describe an assessment in which the amount of tax assessed is based on the applicable provisions of the *Income Tax Act*, correctly interpreted and applied to the relevant facts.

[22] The procedural provisions of the *Income Tax Act* include those relating to statutory limitation periods. Generally, those provisions deprive the Minister of the legal authority to assess tax after the expiry of a certain period of time – the period defined in the *Income Tax Act* as the "normal reassessment period" – unless a statutory exception applies.

[23] For Mr. Ereiser, a taxpayer who is an individual, the normal reassessment period for a particular taxation year is three years after the date of the initial assessment for that year, or the initial notification that no tax is payable for that year, whichever is earlier (paragraph 152(3.1)(*b*) of the *Income Tax Act*). If the reassessments under appeal in this case were made after that limitation period and no statutory exception applies, the reassessments would not be valid, and for that reason they would be subject to being vacated on appeal.

[24] Among the statutory exceptions to the three year limitation period is subparagraph 152(4)(*a*)(i) of the *Income Tax Act*. That provision would cause the three year limitation period for a particular year to be inapplicable if Mr. Ereiser made a misrepresentation "that is attributable to neglect, carelessness or wilful default" in filing his income tax return for that year. In that case, the reassessment for that year could not be vacated for invalidity on the basis that the Minister reassessed outside the applicable time limitation.

[25] If Mr. Ereiser made a misrepresentation that caused the time limitation for a particular year to be inapplicable, the reassessment for that year may be valid. However, it would be incorrect if Mr. Ereiser had no unreported income for that year. In that case, the reassessment would be subject to being vacated on the ground that it is incorrect.

[26] With that background, I turn to the statutory provisions that define the jurisdiction and role of the Tax Court of Canada with respect to appeals from income tax assessments. Its jurisdiction is established by subsection 12(1) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, which reads as follows:

12. (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under … the *Income Tax Act* … 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 de l'impôt sur le revenu* dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

[27] To understand the role of the Tax Court of Canada in income tax appeals, it is useful to begin with subsection 152(8) of the *Income Tax Act*, which sets out the legal effect of an assessment. It reads as follows:

152. (8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, 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.	**152.** (8) Sous réserve des modifications qui peuvent y être apportées ou de son annulation lors d'une opposition ou d'un appel fait en vertu de la présente partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée être valide et exécutoire malgré toute erreur, tout vice de forme ou toute omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.

[28] Subsections 165(1) and 169(1) of the *Income Tax Act* give a taxpayer the right to object to an assessment (which essentially is an administrative review) and then to appeal the assessment to the Tax Court of Canada. Those provisions read as follows:

165. (1) A taxpayer who objects to an assessment under this Part may serve on the Minister a notice of objection, in writing, setting out the reasons for the objection and all relevant facts ….	**165.** (1) Le contribuable qui s'oppose à une cotisation prévue par la présente partie peut signifier au ministre, par écrit, un avis d'opposition exposant les motifs de son opposition et tous les faits pertinents ….
…	…

169. (1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied …	**169.** (1) Lorsqu'un contribuable a signifié un avis d'opposition à une cotisation, prévu à l'article 165, il peut interjeter appel auprès de la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation ….

[29] Subsection 171(1) sets out the ways in which the Tax Court of Canada may dispose of an appeal. It reads as follows:

171. (1) The Tax Court of Canada may dispose of an appeal by	**171.** (1) La Cour canadienne de l'impôt peut statuer sur un appel :
(*a*) dismissing it; or	*a*) en le rejetant;
(*b*) allowing it and	*b*) en l'admettant et en :
(i) vacating the assessment,	(i) annulant la cotisation,
(ii) varying the assessment, or	(ii) modifiant la cotisation,
(iii) referring the assessment back to the Minister for reconsideration and reassessment.	(iii) déférant la cotisation au ministre pour nouvel examen et nouvelle cotisation.

[30] Section 166 of the *Income Tax Act* limits the grounds upon which an assessment may be vacated or varied on appeal. It reads as follows:

166. An assessment shall not be vacated or varied on appeal by reason only of any irregularity, informality, omission or error on the part of any person in the observation of any directory provision of this Act.	**166.** Une cotisation ne peut être annulée ni modifiée lors d'un appel uniquement par suite d'irrégularité, de vice de forme, d'omission ou d'erreur de la part de qui que ce soit dans l'observation d'une disposition simplement directrice de la présente loi.

[31] Based on these provisions, this Court has held that the role of the Tax Court of Canada in an appeal of an income tax assessment is to determine the validity and correctness of the assessment based on the relevant provisions of the *Income Tax Act* and the facts giving rise to the taxpayer's statutory liability. Logically, the conduct of a tax official who authorizes an assessment is not relevant to the determination of that statutory liability. It is axiomatic that the wrongful conduct by an income tax official is not relevant to the determination of the validity or correctness of an assessment. This is explained in *Roitman* (cited above) at paragraph 21:

> [21] 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 Co. Ltd. v. The Queen*, [2004] F.C.J. No. 2030, 2004 FCA 403, at paragraph 6; *Obonsawin v. The Queen*, 2004 G.T.C. 131 (T.C.C.); *Burrows v. Canada*, [2005] T.C.J. No. 614, 2005 TCC 761; *Hardtke v. Canada*, [2005] T.C.J. No. 188, 2005 TCC 263).

[32] Statements to the same effect were made in *Main Rehabilitation* at paragraphs 6 to 8:

> [6] In any event, 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.
>
> [7] As the Tax Court Judge properly notes in her reasons, although the Tax Court has authority to stay proceedings that are an abuse of its own process (see for instance *Yacyshyn v. Canada*, 1999 D.T.C. 5133 (F.C.A.)), Courts have consistently held that the actions of the CCRA cannot be taken into account in an appeal against assessments.
>
> [8] This is because what is in issue in an appeal pursuant to section 169 is the validity of the assessment and not the process by which it is established (see for instance the *Queen v. the Consumers' Gas Company Ltd.* 87 D.T.C. 5008 (F.C.A.) at p. 5012). Put another way, the question is not whether the CCRA officials exercised their powers properly, but whether the amounts assessed can be shown to be properly owing under the Act (*Ludco Enterprises Ltd. v. R.* [1996] 3 C.T.C. 74 (F.C.A.) at p. 84).

[33] In light of this jurisprudence, it is plain and obvious that the Tax Court of Canada will not vacate the reassessments under appeal in this case solely on the basis of the wrongful conduct of a tax official in authorizing them. It follows that the allegations and arguments in the pleadings relating to the misfeasance in public office were properly struck.

[34] Mr. Ereiser argues that he must be permitted to seek a remedy from the Tax Court of Canada for the wrongful conduct of the tax officials in this case because no remedy for their wrongful conduct is available from any other court. I do not accept that argument.

[35] There are many cases in which taxpayers have applied to the Federal Court or the superior court of a province for an order quashing an income tax assessment (or the decision to issue a notice of assessment, which generally amounts to the same thing) because of the alleged unlawful, tortious or unreasonable conduct of tax officials. Those courts may and often do decline to entertain the application or action if they conclude that it represents a collateral attack on the validity and correctness of the assessment because that is a matter within the exclusive original jurisdiction of the Tax Court of Canada (see, for example, *Roitman* at paragraph 20 and *Smith v. Canada (Attorney General)*, 2006 BCCA 237).

[36] However, it is not necessarily true that a taxpayer has no remedy for the wrongful conduct of an income tax official. For example, in *Leroux v. Canada (Revenue Agency)*, 2012 BCCA 63, an action in tort for damages against tax officials was permitted to proceed because the conduct complained of raised justiciable issues apart from those going to the correctness of the assessment (which was not challenged).

[37] There 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. That is explained in the following paragraphs from *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793 at paragraphs 8 to 10:

> [8] We need not engage in a lengthy theoretical discussion on whether s. 18.5 [of the *Federal Courts Act*] 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 *ITA* 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 assess 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 assess 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.

[38] It may be that in this case, the reassessments under appeal will be found to be valid and correct. In that case, they will represent a correct statement of Mr. Ereiser's statutory obligations under the *Income Tax Act*, and they will not be vacated as part of the statutory appeal process for income tax appeals. However, they will be vacated if they are found to be invalid or entirely incorrect. If they are found to be incorrect in part, they will be vacated and referred back to the Minister for reassessment. But regardless of the outcome of Mr. Ereiser's income tax appeal, it will remain open to him to seek a remedy in the Federal Court or the superior court of a province, depending upon the circumstances, if he has a tort claim or an administrative law claim arising from the wrongful conduct of one or more tax officials.

[39] I have not ignored the suggestion of Mr. Ereiser that the conduct of the tax officials is relevant to questions of the admissibility of Crown evidence. This point is not fully developed in the pleadings in relation to the allegations of misfeasance in public office, but the reasoning appears to be that wrongful conduct on the part of the tax officials who authorized the reassessments under appeal will justify an argument that all Crown evidence is inadmissible. This is potentially important because the reassessments in issue were made after the expiry of the normal reassessment periods, and the Crown has the onus of proving the facts required to justify a late reassessment.

[40] Justice Hershfield concluded that this argument is not sound. I agree. The fact that a seizure of documents is unlawful may affect the admissibility of evidence obtained as a result of the seizure, but wrongful conduct unrelated to an evidentiary matter generally is not relevant to the admissibility of evidence. I note that the following allegation of coercion by tax officials will remain in the notice of appeal after giving effect to Justice Hershfield's order:

> 9. The Appellant was offered deals from the criminal enforcement branch of the CRA all of which had the same basic terms: plead guilty and pay an amount of $80,000 'all in'. The deals were offered with an intent to coerce a guilty plea.

Even if this allegation is true, it cannot justify the rejection of Crown evidence that is otherwise admissible.

[41] I turn now to the Crown's cross appeal.

<u>(3) Crown's cross-appeal</u>

[42] The principal ground of the Crown's cross-appeal is that Justice Hershfield erred in failing to give effect to the Crown's claim of "settlement privilege" by striking all factual allegations in the notice of appeal that disclose "confidential communications" intended to resolve the dispute between the parties. The Crown also argues that Justice Hershfield should have struck certain paragraphs on the basis that they plead evidence rather than facts, and on the basis that they allege facts that are irrelevant to any relief that can be sought in the Tax Court of Canada (specifically, allegations involving the conduct of tax officials, and allegations involving delay by tax officials in dealing with objections).

(A) Settlement privilege

[43] The Crown argues that the Crown's offer to issue reassessments that would limit Mr. Ereiser's total liability to $80,000 (estimated to involve income inclusions of approximately $28,000 for each of the three years in issue, rather than the income inclusions totaling approximately $1.7 million as originally proposed) if Mr. Ereiser would admit criminal liability is a "settlement offer" that was or should be presumed to have been communicated in confidence.

[44] Justice Hershfield rejected the Crown's argument because he interpreted the Crown's proposal as primarily an offer made to settle potential criminal proceedings, not to settle a potential challenge to Mr. Ereiser's civil liability. Whether that interpretation is correct is a matter that likely will be explored in the course of pre-trial discovery or at trial, and I will say no more about it at this stage. More important, in my view, is Justice Hershfield's determination, as stated in the recitals to the judgment, that the Crown's proposal could be seen as a threat against Mr. Ereiser which "could be relevant to an onus of proof issue".

[45] As I understand Justice Hershfield's reasons, he exercised his discretion as he did with respect to these provisions so that it would be open to Mr. Ereiser to argue that the reassessments are not based on a *bona fide* determination by the Minister as to the amount of Mr. Ereiser's unreported income. Justice Hershfield undoubtedly had in mind that the Crown pleadings, when filed, will state that the reassessments are based on a factual assumption by the Minister that Mr. Ereiser had unreported income in the amounts set out in the proposal letter totaling $1.7 million for the three years in issue. It is clear from the notice of appeal that Mr. Ereiser intends to argue that the Minister made no such factual assumption. If that argument is sound, it would place on the Crown

the burden of proving that Mr. Ereiser had unreported income in the amounts assessed. In the unusual circumstances of this case, I conclude that Justice Hershfield exercised his discretion appropriately when he refused to order the allegations of the settlement proposal to be struck.

<u>(B) Other alleged deficiencies in the pleadings</u>

[46] The Crown argues that some of the provisions of the notice of appeal that Justice Hershfield permitted to stand are objectionable because they plead evidence rather than facts, or because they allege facts that are irrelevant to any relief that can be sought in the Tax Court of Canada (specifically, allegations involving the conduct of tax officials, and allegations involving delay by tax officials in dealing with objections). In numerous instances, more than one ground of appeal is raised with respect to a single provision.

[47] The Crown's motion sought an order striking all provisions relating to the conduct of tax officials. Justice Hershfield dismissed the motion with respect to the conduct provisions that are relevant to the alleged improper settlement proposal. For those provisions, none of the alternative grounds of appeal are sufficiently meritorious to overcome Justice Hershfield's rejection of the Crown's motion to strike.

[48] Other conduct provisions that Justice Hershfield permitted to remain relate to Mr. Ereiser's allegation that some of his documents were seized and retained by the Minister in breach of Mr. Ereiser's Charter rights, and his related argument that the Crown should not be permitted to adduce any of those documents as evidence. In my view, Justice Hershfield exercised his discretion appropriately when he dismissed the Crown's motion to strike those provisions.

[49] The Crown also objects to a number of provisions supporting Mr. Ereiser's argument that the reassessments were issued outside the normal reassessment period for the years in issue and are therefore invalid. The problem for the Crown, apparently, is that Mr. Ereiser has failed to plead the dates of the reassessments or the dates of the original assessments for the years in issue. This may well be an oversight on the part of Mr. Ereiser. Normally such dates are specifically pleaded. However, the Crown cannot possibly be prejudiced by the failure to plead those dates, since that information is or ought to be known to the Minister. In my view, Justice Hershfield exercised his discretion appropriately when he dismissed the Crown's motion to strike the provisions of the notice of appeal relating to the timing of the reassessments.

Conclusion

[50] For these reasons I would dismiss the appeal and the cross-appeal. In light of the divided success, I would award no costs.

"K. Sharlow"

J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-201-11

(APPEAL AND CROSS-APPEAL FROM A JUDGMENT OR ORDER OF THE HONOURABLE JUSTICE HERSHFIELD IN THE TAX COURT OF CANADA DATED MAY 16, 2011, DOCKET NUMBER 2010-1417ITG.)

STYLE OF CAUSE:	RONALD EREISER v. HMTQ
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	October 29, 2012
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	PELLETIER J.A. MAINVILLE J.A.
DATED:	February 4, 2013

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