Federal Court of Appeal | Cour d'appel fédérale

Date: 20190920

Dockets: A-208-18, A-209-18, A-210-18, A-211-18, A-212-18, A-213-18, A-214-18, A-215-18, A-216-18, A-218-18, A-219-18, A-220-18, A-221-18, A-222-18

Citation: 2019 FCA 235

CORAM: **NADON J.A.**
WEBB J.A.
WOODS J.A.

BETWEEN:

ANTHONY TEDESCO, AHMAD YAQEEN, MAURIZIO MARCHIONI, ROSA MILITANO, PAUL WATT, GERALD JAMES, LYNN JAMES, SARAH BORG OLIVIER, MURRAY J. McPHAIL, ROBERT BORG OLIVIER, JAMES SHAW, JEFF GILLAN, STANLEY HARVEY and SANDRA INGLIS

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on May 1, 2019.

Judgment delivered at Ottawa, Ontario, on September 20, 2019.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NADON J.A.
WOODS J.A.

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Respondent

REASONS FOR JUDGMENT

WEBB J.A.

[1] These appeals raise the issue of whether it is an abuse of process by relitigation for the members of a partnership to pursue an issue related to the validity of a determination of losses of a partnership after the partnership has discontinued its appeal that raised the same issue. As a

result of the Orders of the Tax Court of Canada dated April 23, 2018 (2018 TCC 75), the Crown's motion for an order to strike the appellants' notices of appeal was allowed and these notices of appeal were struck.

[2] For the reasons that follow, I would allow these appeals.

[3] By the Order of this Court dated September 21, 2018, these appeals were consolidated and file A-208-18 was designated as the lead matter. These reasons apply to all of these appeals. The original of these reasons shall be filed in A-208-18 and a copy thereof shall be filed in each of the other files.

I. Background

[4] The appellants are partners of the TSI I Limited Partnership (TSI). TSI allocated losses among its partners in the total amount of $941,840 for the 2000 taxation year and $2,193,463 for the 2001 taxation year. It is not clear from the record which appellants claimed their proportionate share of these losses in 2000 or 2001 (or both years). However, it would appear that each appellant did claim some of these losses for 2000 or 2001 (or both years) in determining his or her income for such year or years for the purposes of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) (Act).

[5] The Minister of National Revenue (Minister) determined that the business losses of TSI for 2000 and 2001 were nil. The notices of determination were dated March 29, 2006. It is the position of the Minister that this determination was made under subsection 152(1.4) of the Act.

[6] Following the granting of an extension of time to file notices of objection, TSI filed notices of objection to these determinations on March 23, 2007. The Minister confirmed the notices of determination by notices of confirmation dated April 18, 2012.

[7] By notices of reassessment of various dates, the Minister reassessed each of the appellants for the relevant taxation year or years for which such appellant had claimed his or her share of such losses to deny this claim for the losses of TSI. The appellants filed notices of objection and these reassessments were confirmed by the Minister.

[8] Following the notices of confirmation that were issued to TSI and to the appellants, TSI and each appellant filed notices of appeal to the Tax Court. As part of the case management of these appeals, it was determined that the appeal of TSI should proceed first. The hearing of this appeal was scheduled for Monday, May 2, 2016. On the Friday before the hearing, Mr. Marchioni (who is one of the appellants in this appeal and who was also counsel for all the partners except James Stewart, Gerald James and Lynn James) notified the Tax Court that TSI was discontinuing its appeal and that it would be filing a notice of discontinuance. The notice of discontinuance was filed on May 2, 2016 and the appeal was deemed to be dismissed on June 24, 2016, pursuant to subsection 16.2 (2) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2 (TCC Act).

[9] In its appeal to the Tax Court, TSI had raised two issues:

- whether the determinations of the losses of TSI that were made by the Minister were made after the three year period, as prescribed in subsection 152(1.4) of the Act, for doing so (and therefore were statute-barred); and

- whether the Minister was correct in determining that the losses for each of 2000 and 2001 were nil.

Each of the appellants, in their notices of appeal to the Tax Court, also raised the same two issues. In the hearing of the motion before the Tax Court (that is the subject of this appeal) and in this appeal, the appellants have only pursued the issue of whether their appeals before the Tax Court should be allowed to continue in relation to the issue of whether the determinations of the losses of TSI that were made by the Minister were statute-barred.

[10] Following the discontinuance by TSI of its appeal before the Tax Court, the Minister brought a motion to strike the notices of appeal of the appellants, without leave to amend, pursuant to Rule 53(1)(*c*) of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a.

II. Decision of the Tax Court

[11] The Tax Court judge raised a preliminary issue in relation to the appeal that was filed by TSI with respect to the determinations made by the Minister of the losses of TSI. Subsection 165(1.15) of the Act provides that an objection in respect of a determination is to be made only by one member of the partnership and that member must be either designated for that purpose in the information return that is required to be filed under the *Income Tax Regulations*, C.R.C., c. 945, or otherwise expressly authorized by the partnership to so act. TSI is the partnership. It is not a member of the partnership.

[12] After receiving submissions from the parties on this preliminary issue, the Tax Court judge concluded that she had to treat TSI's appeal as having been filed on behalf of all of the partners of TSI since no one had challenged the validity of the TSI proceeding while that appeal was ongoing.

[13] With respect to the merits of the motion of the Minister to strike the appellants' notices of appeal, the Tax Court judge relied on the comments of the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (*C.U.P.E.*) (related to whether a proceeding is an abuse of process by relitigation), section 16.2 of the TCC Act, and the decision of this Court in *Canada (Attorney General) v. Scarola*, 2003 FCA 157, [2003] 4 F.C. 645 (related to the consequences of a dismissal under section 16.2 of the TCC Act). She concluded that it would be an abuse of process if the appellants were allowed to argue that the determinations of the losses of TSI made by the Minister were statute-barred.

[14] As a result, the appellants' notices of appeal were struck. All of the individuals whose appeals had been struck (except James Stewart) filed an appeal to this Court and are the appellants in this appeal.

III. Issue and Standard of Review

[15] The issue in this appeal is whether the Tax Court judge erred in striking the appellants' notices of appeal. The standard of review for any question of fact (including any question of mixed fact and law unless there is an extricable question of law) is palpable and overriding error

and for any question of law is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

IV. Analysis

[16] The only issue in this appeal is whether the notices of appeal should have been struck on the basis that the appellants are attempting to re-litigate the issue of whether the determinations made by the Minister were statute-barred, *i.e.*, they were made after the expiration of the three-year time period as prescribed in subsection 152(1.4) of the Act for making such determinations.

[17] A partnership does not pay tax under the Act. Rather, a partnership computes its income (or loss) as if it were a person and then allocates to each partner that partner's proportionate share of such income (or loss). Accordingly, there is no assessment or reassessment of tax payable by a partnership. As a result, if the Minister should disagree with the amount of any income (or loss) claimed by a partnership and allocated to its partners, the Minister will have to reassess each partner. To avoid multiple disputes with several partners with respect to the amount of any income (or loss) of a particular partnership, subsection 152(1.4) of the Act was added to allow the Minister to make one determination of the amount of any income (or loss) of a partnership. The full text of subsections 152(1.4) and (1.7) of the Act is set out in the Annex at the end of these reasons.

[18] Subsection 165(1.15) of the Act provides that a notice of objection to a determination made under subsection 152(1.4) of the Act may be made only by one member of the partnership who is duly designated or authorized to do so. As noted above, the Tax Court judge questioned

why the appeal of the determinations made by the Minister was filed by the partnership and not by a member of the partnership as provided in subsection 165(1.15) of the Act. For the purposes of the hearing before the Tax Court, it was assumed that the appeal filed by the partnership was a valid appeal. The issue of the validity of the appeal filed by TSI in relation to the determinations of the losses of TSI is not before us in this appeal and I would not comment on whether that appeal was a valid appeal. For the purposes of this appeal, the appeal filed by TSI in relation to the determinations of the losses of TSI will be treated as if it were a valid appeal of the loss determinations made by the Minister.

[19] Subsection 152(1.7) of the Act provides that, subject to the rights of objection and appeal, the determination made by the Minister under subsection 152(1.4) of the Act of the income (or loss) of the partnership is binding on the Minister and each member of the partnership. Subsection 152(1.7) of the Act also provides that the Minister may, notwithstanding subsection 152(4) of the Act, reassess each partner "before the end of the day that is one year after the day on which all rights of objection and appeal expire or are determined in respect of the determination or redetermination".

[20] In this case, the appeals filed by the individual appellants are in relation to their reassessments for 2000 and 2001. Would allowing the appellants to proceed with their appeals of their personal reassessments in relation to the issue of whether the determinations that were made by the Minister were made after the expiration of the period provided for making such determinations be an abuse of process by relitigation?

[21] As noted, the Tax Court judge relied on two cases and section 16.2 of the TCC Act to support her position that the notices of appeal should be struck. The question of the interpretation of the law as set in these cases and the interpretation of section 16.2 of the TCC Act is a question of law and therefore the standard of review is correctness. In my view, the Tax Court judge erred in her interpretation of these cases and of subsection 16.2(2) of the TCC Act in concluding that abuse of process by relitigation could, in law, apply in a situation where a court could have but did not make a particular finding because the appeal that had raised a particular issue was discontinued.

[22] The leading case on whether a proceeding is an abuse of process by relitigation is the decision of the Supreme Court of Canada in *C.U.P.E.* In this case, Glenn Oliver worked for the City of Toronto as a recreation instructor and he was convicted of sexually assaulting a boy under his supervision. Following his conviction, his employment with the City of Toronto was terminated. He filed a grievance in relation to his dismissal from his employment and the issue was whether Mr. Oliver could, in his grievance proceeding, relitigate whether he had sexually assaulted the boy.

[23] In determining that Mr. Oliver could not relitigate this issue, Arbour J., writing on behalf of the majority the Supreme Court of Canada, stated that:

> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

[Emphasis added by Arbour J.]

[24] As noted by the Supreme Court of Canada, abuse of process has been applied where the litigation that is before a court is in essence an attempt to relitigate a claim that the court has already determined. In this particular case, there has not been any finding by the Tax Court that the determinations made by the Minister were made within or after the expiration of the time period for doing so as provided in subsection 152(1.4) of the Act.

[25] In this case, the appeal of TSI (that had raised the claim that the determinations made by the Minister were statute-barred) was discontinued. The Tax Court judge found that the

discontinuance of the appeal, as a result of the application of subsection 16.2(2) of the TCC Act, would mean that any issues that were raised in this appeal would be "deemed to have been adjudicated and dismissed by the Court at the partnership level" (paragraph 52 of the reasons of the Tax Court judge).

[26] I am unable to agree with this interpretation of subsection 16.2(2) of the TCC Act. Section 16.2 of the TCC Act provides that:

16.2 (1) A party who instituted a proceeding in the Court may, at any time, discontinue that proceeding by written notice.	16.2 (1) La partie qui a engagé une procédure devant la Cour peut en tout temps s'en désister par avis écrit.
(2) Where a proceeding is discontinued under subsection (1), it is deemed to be dismissed as of the day on which the Court receives the written notice.	(2) Le désistement équivaut au rejet de la procédure en cause à la date à laquelle la Cour reçoit l'avis de désistement.

[27] This section simply provides that the appeal is deemed to be dismissed. It does not deem that any issues that were raised by the party who instituted the particular proceeding have been determined by the Tax Court. While the Tax Court judge referred to the decision of this Court in *Scarola*, in my view, this case does not support the position as taken by her. In *Scarola*, this Court noted that:

> 21 An appeal discontinued is, pursuant to subsection 16.2(2), an appeal dismissed. An appeal dismissed is an appeal disposed of, and an appeal which has been disposed of no longer exists: see *Lehner v. M.N.R.*, 97 D.T.C. 5270, at page 5271 per Pratte J.A. (F.C.A.). Subsection 16.2(2) operates to turn the filing of a discontinuance into a constructive dismissal akin to an actual dismissal. In other words, the discontinuance of an appeal, as a result of that subsection, takes on all of the properties of a dismissal. It produces the same effect as a judgment of dismissal by the Court, albeit that effect is obtained by sheer operation of the legal fiction. In either case, the powers of the Court are spent: the decision maker is

> *functus officio*. A dismissal, deemed or actual, is a final determination which closes the matter, barring some vitiating circumstances such as fraud or some statutory authority allowing the decision maker to retain or recapture the lost authority.

[28] I do not read this passage as supporting an interpretation of subsection 16.2(2) of the TCC Act which would lead to a result that each and every issue raised by an appellant has been deemed to have been determined by a court when the matter is discontinued and therefore dismissed. This excerpt simply confirms that the discontinuance of an appeal concludes that matter and the same person cannot, except in exceptional circumstances, later attempt to revive that appeal.

[29] In this particular case, TSI had raised the issue of whether the determinations made by the Minister were statute-barred. That issue could have been (and presumably would have been) addressed and determined if TSI's appeal scheduled for May 2, 2016 would have been held. However, since that appeal was discontinued, there has been no judicial determination of whether the determinations were made within the time period as set out in subsection 152 (1.4) of the Act or after the expiration of this time period.

[30] In *C.U.P.E.*, Arbour J. also made the following comments in relation to the doctrine of abuse of process and the integrity of the adjudicative process:

> 51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some

> witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[31] It would not be a waste of judicial resources to have this statute-barred issue determined in relation to the appeals filed by the appellants, nor could it lead to any possible inconsistency, since there has been no determination by the Tax Court of this issue.

[32] In this case, there are two possibilities – either the determinations made by the Minister were made within the time periods as prescribed in subsection 152(1.4) of the Act, or they were not. If a court were to find that the determinations were made after the expiration of the time period as set out in subsection 152(1.4) of the Act, the consequences that would arise in relation to the reassessments of the appellants' 2000 and/or 2001 taxation years would have to be determined by the court.

[33] It should be noted that in the replies filed by the Minister in relation to the appeals filed by the appellants, the Minister indicated that the reassessments were issued under subsection 152(1.7) of the Act. Since subsection 152(1.7) of the Act applies "[w]here the Minister makes a determination under subsection (1.4)", there is an issue of whether this subsection will apply if the determination is made after the expiration of the time period as prescribed in subsection 152(1.4) of the Act.

[34] As a result, in my view, it would not be an abuse of process for the appellants to raise the issue of whether the determinations were made after the expiration of the time period as

prescribed in subsection 152(1.4) of the Act and, if so, how this would affect the reassessments of the appellants that were issued under subsection 152(1.7) of the Act.

[35] I do not agree with the decision of the Tax Court judge that the appellants' notices of appeal that were filed with the Tax Court should be struck in relation to the issue of whether the determinations were made after the end of the period provided under the Act for making these determinations.

[36] I would therefore allow these appeals with one set of costs and set aside the Orders issued by the Tax Court. Rendering the decision that the Tax Court judge should have made, I would dismiss the motion brought by the Crown to strike the appellants' notices of appeal that were filed with the Tax Court, with one set of costs in the Tax Court.

"Wyman W. Webb"
J.A.

"I agree
M. Nadon J.A."

"I agree
Judith Woods J.A."

ANNEX

Subsections 152(1.4) and (1.7) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)

(1.4) The Minister may, within 3 years after the day that is the later of	(1.4) Le ministre peut déterminer le revenu ou la perte d'une société de personnes pour un exercice de celle-ci ainsi que toute déduction ou tout autre montant, ou toute autre question, se rapportant à elle pour l'exercice qui est à prendre en compte dans le calcul, pour une année d'imposition, du revenu, du revenu imposable ou du revenu imposable gagné au Canada d'un de ses associés, de l'impôt ou d'un autre montant payable par celui-ci, d'un montant qui lui est remboursable ou d'un montant réputé avoir été payé, ou payé en trop, par lui, en vertu de la présente partie. Cette détermination se fait dans les trois ans suivant le dernier en date des jours suivants :
(a) the day on or before which a member of a partnership is, or but for subsection 220(2.1) would be, required under section 229 of the *Income Tax Regulations* to make an information return for a fiscal period of the partnership, and	a) le jour où, au plus tard, un associé de la société de personnes est tenu par l'article 229 du *Règlement de l'impôt sur le revenu* de remplir une déclaration de renseignements pour l'exercice, ou serait ainsi tenu si ce n'était le paragraphe 220(2.1);
(b) the day the return is filed,	b) le jour où la déclaration est produite.
determine any income or loss of the partnership for the fiscal period and any deduction or other amount, or any other matter, in respect of the partnership for the fiscal period that is relevant in determining the income, taxable income or taxable income earned in Canada of, tax or other amount payable by, or any amount refundable to or deemed to have been paid or to have been an overpayment by, any member of the partnership for any taxation year under this Part.	

…

(1.7) Where the Minister makes a determination under subsection 152(1.4) or a redetermination in respect of a partnership,

(a) subject to the rights of objection and appeal of the member of the partnership referred to in subsection 165(1.15) in respect of the determination or redetermination, the determination or redetermination is binding on the Minister and each member of the partnership for the purposes of calculating the income, taxable income or taxable income earned in Canada of, tax or other amount payable by, or any amount refundable to or deemed to have been paid or to have been an overpayment by, the members for any taxation year under this Part; and

(b) notwithstanding subsections 152(4), 152(4.01), 152(4.1) and 152(5), the Minister may, before the end of the day that is one year after the day on which all rights of objection and appeal expire or are determined in respect of the determination or redetermination, assess the tax, interest, penalties or other amounts payable and determine an amount deemed to have been paid or to have been an overpayment under this Part in respect of any member of the partnership and any other taxpayer for any taxation year as may be necessary to give effect to the determination or redetermination or

[…]

(1.7) Les règles suivantes s’appliquent lorsque le ministre détermine un montant en application du paragraphe (1.4) ou détermine un montant de nouveau relativement à une société de personnes :

a) sous réserve des droits d’opposition et d’appel de l’associé de la société de personnes visé au paragraphe 165(1.15) relativement au montant déterminé ou déterminé de nouveau, la détermination ou nouvelle détermination lie le ministre ainsi que les associés de la société de personnes pour ce qui est du calcul, pour une année d’imposition, du revenu, du revenu imposable ou du revenu imposable gagné au Canada des associés, de l’impôt ou d’un autre montant payable par ceux-ci, d’un montant qui leur est remboursable ou d’un montant réputé avoir été payé, ou payé en trop, par eux, en vertu de la présente partie;

b) malgré les paragraphes (4), (4.01), (4.1) et (5), le ministre peut, avant la fin du jour qui tombe un an après l’extinction ou la détermination des droits d’opposition et d’appel relativement au montant déterminé ou déterminé de nouveau, établir les cotisations voulues concernant l’impôt, les intérêts, les pénalités ou d’autres montants payables et déterminer les montants réputés avoir été payés, ou payés en trop, en vertu de la présente partie relativement à un associé de la société de personnes et à tout autre contribuable pour une année d’imposition pour tenir compte du montant déterminé ou déterminé de

a decision of the Tax Court of Canada, the Federal Court of Appeal or the Supreme Court of Canada.

nouveau ou d’une décision de la Cour canadienne de l’impôt, de la Cour d’appel fédérale ou de la Cour suprême du Canada.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEALS FROM THE ORDERS OF THE TAX COURT OF CANADA, DATED APRIL 23, 2018, CITATION NUMBER 2018 TCC 75

DOCKETS:	A-208-18, A-209-18, A-210-18, A-211-18, A-212-18, A-213-18, A-214-18,A-215-18, A-216-18, A-218-18, A-219-18, A-220-18, A-221-18, A-222-18
STYLE OF CAUSE:	ANTHONY TEDESCO et al. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 1, 2019
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NADON J.A. WOODS J.A.
DATED:	SEPTEMBER 20, 2019

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