Federal Court of Appeal Cour d'appel fédérale

Date: 20200110

Docket: A-333-18

Citation: 2020 FCA 4

CORAM: **PELLETIER J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CBS CANADA HOLDINGS CO.

Respondent

Heard at Toronto, Ontario, on September 17, 2019.

Judgment delivered at Ottawa, Ontario, on January 10, 2020.

REASONS FOR JUDGMENT BY: WOODS J.A.

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

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REASONS FOR JUDGMENT

WOODS J.A.

[1] The Tax Court of Canada granted a motion brought by CBS Canada Holdings Co. (CBS) for an order allowing its appeal from reassessments under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (ITA) (2018 TCC 188). The Crown has appealed.

[2] The motion concerned a settlement agreement signed by the parties in early 2015, and which required the Minister of National Revenue to reassess certain taxation years. After the agreement was executed but before the reassessments were issued, the Crown informed CBS that it had recently discovered that one of the proposed reassessments was not supported by the facts. The Crown stated that it was not possible to issue the reassessment in these circumstances.

[3] CBS responded by insisting that the Crown honour the settlement agreement and it promptly brought a motion before the Tax Court to allow its appeal in accordance with the agreement. After an oral hearing, the Tax Court agreed with CBS and granted the relief sought.

I. Background

[4] Although the evidentiary record is sparse, the background below is not in dispute as far as I am aware.

[5] CBS, an indirect wholly-owned subsidiary of CBS Corporation, is a successor by amalgamation to several other corporations. Some of these corporations incurred substantial non-capital losses during the period from 1999 to June 30, 2002. A portion of the non-capital losses arose from deductions claimed by CBS' predecessors for rental obligations relating to leased movie theatres.

[6] The non-capital losses were carried forward to subsequent taxation years, including CBS' taxation years ended March 7, 2007 and December 31, 2007 (the 2007 taxation years). The carry forward amounts deducted in these years were $25,751,078 and $7,557,852, respectively.

[7] In 2011, the Minister reassessed the 2007 taxation years and reduced the carry forward amounts to $893,260 and $382,594, respectively. The Minister took the view that CBS' predecessors had incorrectly deducted the rental obligations and therefore the non-capital losses available for carry forward were much less than the amounts claimed by CBS in its returns for the 2007 taxation years. In connection with these reassessments, the Minister also allowed consequential capital losses which were carried forward in part to the 2007 taxation years at CBS' request.

[8] In 2013, CBS appealed from the reassessments to the Tax Court. CBS submitted that the rental obligations were properly deducted by its predecessors and therefore the Minister had incorrectly disallowed the non-capital loss carry forwards claimed in CBS' returns for the 2007 taxation years.

[9] By letter dated April 24, 2014, CBS made an offer to settle the appeal. The offer did not propose a compromise on the rent deductions, which was the issue raised in the notice of appeal. Rather, CBS proposed a different way of achieving a similar result.

[10] CBS proposed to accept the disallowance of the rent deductions and the resulting reduced non-capital loss carry forwards, and to apply the carry forwards to taxation years from 2002 to

2007 in a manner that resulted in an additional carry forward of $24 million being available in the taxation year ended March 7, 2007.

[11] After considering the offer for several months, the Crown accepted it with only a minor change not relevant to this appeal. The minutes of settlement signed on January 7, 2015 included the following terms:

- The rental obligations are not deductible in the taxation years that they were claimed by CBS.
- The revised non-capital loss carry forwards are to be applied to the 2002 to 2007 taxation years in the manner set out in a schedule to the agreement.
- The Minister is to reassess the taxation year ended March 7, 2007 to allow an additional non-capital loss carry forward in the amount of $24,366,301 and to disallow an allowable capital loss carry forward in the amount of $1,540,380.
- The Minister is to reassess the taxation year ended December 31, 2007 to disallow an allowable capital loss carry forward in the amount of $14,356,044.
- The Minister is to reassess the 2008 to 2010 taxation years to disallow the consequential allowable capital loss carry forwards taken in these years.

[12] Prior to issuing any reassessments, the Crown informed CBS that, "[c]ontrary to its prior understanding, the CRA has recently discovered that there are no non-capital losses available for carry forward to the taxation years under appeal." The Crown further stated that the Minister is not able to issue a reassessment that is contrary to the provisions of the ITA and it invited CBS to provide support for its position that the $24 million loss carry forward was available.

[13] CBS refused to provide the information requested and told the Crown that the time for discussion had ended. CBS also filed a motion in the Tax Court in which it requested that the Court allow its appeal for the 2007 taxation years in accordance with the settlement agreement.

II. Tax Court decision

[14] Before the Tax Court, the Crown submitted that the settlement agreement was "factually indefensible with no bearing in reality, therefore, illegal and non-binding on the Minister" (Tax Court reasons at para. 38). In support, the Crown filed an affidavit of the appeals officer who had reviewed CBS' notice of objection. The appeals officer stated that only $893,260 was available as a non-capital loss carry forward to the taxation year ended March 7, 2007 and a schedule was attached to the affidavit showing this calculation. He further stated that the Crown made a mistake in concluding that CBS had $24 million of carry forwards available, but he did not otherwise describe the nature of the mistake. The affidavit did not specifically mention the application of the reduced carry forwards to the 2002 to 2007 taxation years that was set out in the settlement agreement.

[15] CBS submitted at the Tax Court that the additional $24 million of loss carry forwards were available in the taxation year ended March 7, 2007, and that the parties had agreed to this in the settlement agreement when they agreed to apply the reduced loss carry forwards in a particular manner.

[16] The Tax Court agreed with CBS' position. The Court was particularly critical of the affidavit of the appeals officer and was not satisfied that the officer was sufficiently knowledgeable about the settlement negotiations. The Court was not persuaded by the statement in the affidavit that the Crown had made a mistake, and the Court concluded that the parties' agreement centred on the application of reduced loss carry forwards as set out in the schedule to the agreement. The Court also concluded that an additional $24 million of loss carry forwards "existed and was available for carry-forward to the March 2007 TY" (Tax Court reasons at para. 77).

[17] Ultimately, the Tax Court concluded that "the agreed fact in the Minutes – that the $24,366,301 is available – is grounded in objective reality […] defensible on the facts (and the law) and the agreement is therefore binding, valid and enforceable against the Minister. Had this proceeded to trial, the Court could issue a judgment consistent with the order directing the Minister to reassess on said basis" (Tax Court reasons at para. 78).

III. Issues

[18] Three issues are engaged in this appeal:

- Did the Tax Court err in concluding that the appeal should be allowed in accordance with the settlement agreement?

- Do the reassessments outlined in the settlement agreement result in an impermissible increase in tax payable? This issue was raised by the Court after this hearing, and written submissions were subsequently received.

- Does the Tax Court have jurisdiction to entertain the motion? This issue was raised by the Crown in their subsequent submissions.

IV. Positions of the parties

[19] In this section, I outline the positions of the parties on the first issue.

[20] The foundation of the Crown's submissions in this Court is that the settlement agreement is factually and legally indefensible, and as such the Minister is precluded from issuing the proposed reassessments. It relies on the following principle from *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 at 602, 1974 D.T.C. 6355 (C.A.):

> [7] […] the Minister has a statutory duty to assess the amount of tax payable on the facts as he finds them in accordance with the law as he understands it. It follows that he cannot assess for some amount designed to implement a compromise settlement and that, when the Trial Division, or this Court on appeal, refers an assessment back to the Minister for re-assessment, it must be for re-assessment on the facts in accordance with the law and not to implement a compromise settlement.

[21] The Crown submits that the Tax Court made reviewable errors of mixed fact and law when it concluded that the agreement was defensible on the facts and the law. It states that the standard of review is the highly deferential standard of palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235), and suggests that this standard is met in this case.

[22] The Crown alleges that the Tax Court erred by failing to take into account the Crown's evidence from the appeals officer regarding the available loss carry forwards. The Crown also suggests that the Tax Court made two legal errors. First, the Tax Court failed to consider that, pursuant to subsection 111(3) of the ITA, if non-capital losses are used in a taxation year they may no longer be claimed in a later year. Second, the Tax Court failed to consider that "[t]he Minister is not permitted to change a taxpayer's taxable income [for an earlier year] without reassessing […]." No authority was provided for this argument. As far as I know, these legal arguments were made for the first time in this Court.

[23] CBS argues that the Tax Court was entitled to rely on the explicit terms of the settlement agreement to conclude that the additional $24 million of loss carry forwards were "grounded in objective reality". CBS also submits that the Crown should not be able to allege errors of law at this late stage. However, it submits that there are no such errors in any event because the ITA does not prohibit the reallocation of loss carry forwards. Three judicial decisions were relied on as support for the ability to reallocate: *CCLI (1994) INC. v. R.*, 2007 FCA 185, 2007 D.T.C. 5372; *Leola Purdy Sons Ltd. v. R.*, 2009 TCC 21, 2009 D.T.C. 1042; and *Trom Electric Co. v. R.*,

2004 TCC 727, 2005 D.T.C. 62. As far as I am aware, the Tax Court was not referred to these decisions.

V. Discussion

A. *Did the Tax Court err in concluding that the appeal should be allowed in accordance with the settlement agreement?*

[24] For the reasons below, I have concluded that the Tax Court did not err when it determined that the appeal should be allowed in accordance with the settlement agreement, but I reach this conclusion for different reasons.

[25] In this motion, the Crown seeks to resile from a settlement agreement that it freely made and believed at the time to be principled. The Crown relies on *Galway*, but in my view this decision does not provide the relief that the Crown seeks.

[26] In *Galway*, the Federal Court of Appeal had before it an application for a consent judgment that was made in the context of an appeal to that Court after the Federal Court had dismissed the taxpayer's appeal. The dispute concerned whether an amount of $200,500 received by the taxpayer was to be included in income. The parties arrived at a settlement whereby the Minister would reassess the taxpayer for only part of the $200,500, and they applied for a consent judgment on this basis.

[27] The Federal Court of Appeal was concerned that the settlement was intended to be a compromise, that is, a settlement not in accordance with the application of the law to the true facts: in this case either the whole amount was income, or it was not. The Court concluded that the settlement could not be effected in these circumstances because the Minister could not reassess to characterize only a part of the amount as income. Nevertheless, the Court acknowledged the parties' argument that the facts may not be as they appeared. Accordingly, the Court suggested to the parties that they could reapply to the Court with an application that contained a recital that the parties intended to effect a settlement that reflects an application of the law to the true facts.

[28] The Court in *Galway* took the opportunity to outline general principles to be applied when a court reviews an application for a consent judgment in a tax context. Importantly, the Court emphasized the limited role that courts play in these circumstances:

> [4] […] where a consent judgment can be given, the judgment should, in our view, be based exclusively on the consent. It is no part of the Court's function, on an application for consent judgment, to examine the issues, either of fact or of law, involved in the appeal except in so far as may be necessary for the Court to satisfy itself that the judgment sought is within the jurisdiction of the Court and is one that can legally be granted. For the latter purpose, there may be occasions when affidavit evidence may be appropriate but, generally speaking, the papers should be so drawn that such evidence is not necessary.
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> […]
>
> [8] […] There is, however, at least one exception to the unquestioning granting of consent judgments, regardless of who the parties are, namely, that the Court cannot grant a judgment on consent that it could not grant after the trial of an action or the hearing of an appeal. It follows that, as the Court cannot, after a trial or hearing, refer a matter back for assessment except for assessment in the manner provided by the statute and cannot therefore, at such a stage, refer a matter back for re-assessment to implement a compromise settlement, the Court cannot refer a matter back by way of a consent judgment for re-assessment for such a purpose.

[29] The *Galway* decision is now almost 50 years old and remains good law despite being the subject of some criticism over the years. However, the comments in *Galway* were made in a very different context than the circumstances in this appeal.

[30] In *Galway*, the Court intended to provide guidance regarding the circumstances in which a court should intervene of its own motion on an application for consent judgment in which both parties agree. Typically, such an application is made without any submissions from the parties as to the merits. The Court in *Galway* cautions that courts are generally not to wade into the issues in these circumstances. *Galway* intended that courts would intervene only in very limited circumstances where it was evident on the face of the limited material before the Court there was a factual or legal problem with the settlement.

[31] I am of the view that the principles from *Galway* do not provide the relief that the Crown seeks in this case. First, in this case one party seeks to resile from a settlement agreement that it freely made. By contrast, the parties in *Galway* sought to uphold their agreement and the Court acted on its own motion in finding that the agreement could not be enforced. The Court in *Galway* does not address the circumstances in which one party seeks to resile from an agreement.

[32] Second, the parties in this case intended to enter into an agreement that applied the law to the facts. The agreement was not intended to be a compromise settlement of the type considered in *Galway*.

[33] Third, the Crown does not suggest that the defect within the settlement agreement is self-evident to the Court as it was in *Galway*. Instead, the Crown requests that the Court make a determination of the law and the facts after hearing evidence and legal argument. *Galway* has no application in these circumstances.

[34] In my view, the Crown's reliance on *Galway* in this case is misplaced. Further, the Crown does not suggest any means other than *Galway* for providing relief.

[35] The general rule is that parties should be bound by the agreements that they make. There is no good reason to create an exception here. As suggested by the Tax Court in *1390758 Ontario Corp. v. R.,* 2010 TCC 572, 2010 D.T.C. 1385, this would be very unfair to CBS: "[b]oth sides of a dispute are entitled to know that if they invest the time and effort required to negotiate a settlement, then their agreement will bind both parties" (at para. 37).

[36] The Crown entered into the settlement agreement believing that it was in its best interest to do so. It should be required to live up to its bargain. In my view, it would not be appropriate for the Court to wade into the merits of the agreement.

[37] Subject to the issues discussed below, I would conclude that the Tax Court did not err in concluding that the appeal should be allowed in accordance with the settlement agreement.

B. *Do the reassessments outlined in the settlement agreement result in an impermissible increase in tax payable?*

[38] The Tax Court's order allows CBS' appeals for the 2007 taxation years and refers the reassessments back to the Minister for reconsideration and reassessment under paragraph 171(1)(*b*) of the ITA in accordance with the terms of the settlement agreement.

[39] The order appears to have the likely effect of reducing CBS' tax for its taxation year ended March 7, 2007 and increasing tax for the taxation year ended December 31, 2007. The increase in tax results from the disallowance of an allowable capital loss carry forward in the amount of $14,356,044.

[40] After the hearing, the Court requested that the parties provide supplemental written submissions regarding whether the order would result in an increase in tax for one of the taxation years and, if so, whether this is permissible under the ITA.

[41] In their supplemental submissions, the Crown submits that the order likely has the result of increasing tax for one taxation year. It argues that this is impermissible because the Tax Court may not issue a judgment that has the effect of increasing the tax payable for the year, citing *Harris v. Minister of National Revenue*, [1964] C.T.C. 562, 64 D.T.C. 5332 (Ex. Ct.) and *R. v. Last,* 2014 FCA 129, 2014 D.T.C. 5077.

[42] *Harris* establishes the general principle. In *Harris*, the Minister reassessed a taxpayer by disallowing a claim for capital cost allowance and allowing a consequential deduction for rent in

the amount of $775. The taxpayer appealed, and at the hearing the Crown applied to amend the reply to request an order reducing the deduction to $525.

[43] The Court refused the application to amend the reply and in doing so stated the following principle (D.T.C. at p. 5337):

> […] No appeal to this Court from the assessment is given by the statute to the Minister and since in the circumstances of this case the disallowance of the $775.02 while allowing $525 would result in an increase in the assessment the effect of referring the matter back to the Minister for that purpose would be to increase the assessment and thus in substance allow an appeal by him to this Court.

[44] It is significant that, in both *Harris* and *Last*, it was the Crown and not the taxpayer that sought an increase in tax. In effect, the Minister was attempting to appeal its own reassessment.

[45] The facts in this appeal are quite different. It is CBS and not the Crown that seeks an order requiring a reassessment that may give rise to an increase in tax. The Crown is not attempting to appeal its own reassessment. Accordingly, the *Harris* principle has no application on these facts and cannot serve to prevent the appeal being allowed in accordance with the settlement agreement.

C. *Does the Tax Court have jurisdiction to entertain the motion?*

[46] In their supplemental submissions, the Crown introduced a new argument that the Tax Court did not have jurisdiction to entertain the motion. The Crown included this argument in its

supplemental submissions without seeking leave of the Court to do so. I will first address this preliminary matter.

[47] The Crown acknowledges that this is a new issue but suggests that jurisdictional issues may be raised at any time. It relies on the following comment in *Telus Communications Inc. v. Canada (Attorney General)*, 2005 FCA 143, 337 N.R. 255:

> [10] For a sound, proper and orderly administration of justice, a question going to the jurisdiction of the Court to adjudicate can always be raised.

[48] *Telus* instructs that a jurisdictional issue can be raised at any time, but this does not mean that the issue can be raised in a manner that may be prejudicial to the other party. At this late stage, leave from the Court should have been sought, and, if granted, the Court would set appropriate timelines for submissions on this issue. The potential prejudice to CBS was compounded when the Crown significantly expanded its submissions in its reply to which CBS had no further right to respond.

[49] CBS did not request further time to make submissions, but it sought costs from the Crown. In this regard, the parties came to an agreement that costs of the appeal should be allowed to CBS in the amount of $15,000 regardless of the outcome.

[50] I now turn to the merits of the jurisdiction issue.

[51] It is well established in Tax Court jurisprudence that the Court has jurisdiction to enforce a settlement agreement by allowing an appeal and ordering a reassessment in accordance with subsection 171(1) of the ITA (See for example *Huppe v. R.*, 2010 TCC 644, 2011 D.T.C. 1042).

[52] Subsection 171(1) is a general provision that sets out the remedies that the Tax Court may grant in disposing of an appeal. It reads:

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.

[53] The Crown does not take issue with the principle stated in *Huppe*. However, the Crown submits that the Tax Court lacks jurisdiction in the particular circumstances of this motion for two reasons. At paragraph 21 of its supplemental submissions, the Crown suggests that "the Tax Court of Canada did not have the jurisdiction to entertain CBS's motion to enforce a settlement reached under subsection 169(3) of the *Income Tax Act* as it resulted in an increase to tax payable and involved reassessments of taxation years whose assessments were not the subject of an appeal to the Tax Court of Canada."

[54] In my view, neither of these reasons causes the Tax Court to be deprived of jurisdiction in this motion.

[55] First, there is no reason why an increase in tax payable should preclude the Tax Court from granting the remedy sought. The Crown suggests that doing so is prohibited because the Tax Court cannot increase tax payable in a statute-barred year. However, the principle against increasing tax on an appeal has nothing to do with the statute bar provisions. The principle, as outlined in *Harris*, is that the ITA does not give the Minister the right to appeal to the Tax Court from their own assessments. This principle does not concern the statute bar rules. Moreover, I have outlined above that the *Harris* principle does not apply given the circumstances of this case.

[56] Second, the Crown suggests that the motion impermissibly involves taxation years that are not the subject of an appeal to the Tax Court. This refers to the part of the settlement agreement in which allowable capital losses for later taxation years are to be disallowed. It is suggested that only the Federal Court has jurisdiction in these circumstances.

[57] The Crown suggests that the motion “involves” the later taxation years. I disagree. The motion is not for an order to enforce the settlement agreement wholesale. The later taxation years are not “involved” because the motion only seeks an order with respect to the 2007 taxation years and the issue raised in the motion is discrete to these years. The parts of the settlement agreement dealing with the later taxation years are relevant for the motion only to provide general context and background. Accordingly, no jurisdictional question arises as a result of the reference to other taxation years in the settlement agreement.

D. *Conclusion*

[58] For the reasons above, I would dismiss the appeal with costs to the respondent in the amount of $15,000 including disbursements.

"Judith Woods"
J.A.

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

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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