

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20200131**

**Docket: A-156-19**

**Citation: 2020 FCA 32**

**CORAM: GAUTHIER J.A.  
RENNIE J.A.  
LOCKE J.A.**

**BETWEEN:**

**SAM PRINCE**

**Appellant**

**and**

**MINISTER OF NATIONAL REVENUE AND  
CANADA REVENUE AGENCY**

**Respondents**

Heard at Montréal, Quebec, on January 22, 2020.

Judgment delivered at Ottawa, Ontario, on January 31, 2020.

**REASONS FOR JUDGMENT BY:**

**RENNIE J.A.**

**CONCURRED IN BY:**

**GAUTHIER J.A.  
LOCKE J.A.**

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**REASONS FOR JUDGMENT**

**RENNIE J.A.**

[1] The appellant Sam Prince appeals from the decision of the Federal Court (2019 FC 348, per Annis J.) dismissing a judicial review application of a decision of an officer of the respondent Canada Revenue Agency (CRA) and refusing an interlocutory injunction restraining the Minister from proceeding with the reassessment of the appellant's income tax returns.

[2] The events and proceedings which underlie the judicial review application are described in the Federal Court decision. It is not, for the purpose of the disposition of this appeal, necessary that they be revisited in any detail.

[3] Suffice to say that on June 22, 2017, in the course of an audit, CRA informed Mr. Prince of proposed reassessments for the 2005 to 2014 taxation years. It invited him to provide further information and submissions. Two weeks later, on July 6, 2017, after being advised of the intention to reassess, but prior to the issuance of the notices of reassessment, Mr. Prince filed an application under the voluntary disclosure program (VDP).

[4] The objective of the VDP as described in Information Circular (IC00-1R5) is to promote compliance with taxation laws by encouraging taxpayers to voluntarily come forward and correct errors or omissions in past filings. Taxpayers who make a valid disclosure will have to pay the taxes or charges plus interest, but without penalty or prosecution to which they would otherwise be subject. The Minister may also grant partial relief in respect of the interest arising for the years preceding the three most recent years of returns required to be filed (VDP, sections 8, 11 and 12).

[5] The Minister found that Mr. Prince's disclosure was not voluntary and dismissed his VDP application. As provided by the VDP program, Mr. Prince subsequently requested an internal review of the Minister's decision (second-level VDP review).

[6] On August 20, 2018, prior to a decision on the second-level VDP review, CRA informed Mr. Prince of its intention to commence a second audit, this time for the 2007 to 2016 taxation years. Again, it requested the appellant to provide further information. Mr. Prince objected on the basis that the second audit and the request for additional information were premature given the pending decision on the second-level VDP review.

[7] On December 17, 2018 CRA sent Mr. Prince a letter detailing the proposed reassessments arising from the audits (the proposal letter). The proposal letter set forth the penalties and interest charges which the Minister proposed to include in the reassessments. It invited him to provide additional information and submissions. It concluded by noting that if further information was not forthcoming the proposed reassessments might issue without further notice.

[8] On January 16, 2019, Mr. Prince filed an application for judicial review to quash the December 17, 2018 proposal letter along with a motion for an interlocutory injunction to prevent the Minister from issuing the proposed reassessments.

[9] On February 18, 2019, the Minister reassessed Mr. Prince for the 2013 to 2016 taxation years. On April 18, 2019, the Minister reassessed Mr. Prince for the 2007 to 2016 taxation years. Notices of Objection have been filed in respect of each of the reassessments.

[10] On March 18, 2019, Mr. Prince's second-level VDP review application was dismissed. On April 17, 2019, Mr. Prince filed an application for judicial review against that decision. That application remains outstanding.

[11] The Federal Court dismissed the judicial review application on the basis that the December 17, 2018 proposal letter was not a reviewable decision within the scope of section 2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The Court rejected the requested injunctive relief, seeing no prejudice or harm to the taxpayer if the reassessments issued.

[12] The discretionary decision to refuse the injunction is assessed against the standard of palpable and over-riding error (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215). The standard of review applicable to the question whether the proposal letter constitutes a reviewable decision was not argued before us. This is of no consequence; regardless of which branch of the test in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 is applied, the outcome is the same.

[13] The Notices of Reassessment having been issued, the question whether an injunction could have issued restraining their issuance pending determination of the second-level VDP application is moot. As a matter of law, the reassessments are valid and binding until set aside by the Tax Court, a matter within the exclusive jurisdiction of the Tax Court (*Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, ss. 152(8), 169; *Canada v. Roitman*, 2006 FCA 266 at para. 19; *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paras. 24, 27).

[14] Before this Court, the appellant renews his argument that the reassessments must be stayed or enjoined until the recourse mechanisms contemplated by the VDP, including the application to the Federal Court under section 18.1 to set aside the VDP decision and any appeal, are exhausted. The appellant contends that he will be prejudiced by the fact that the enforcement powers available to the Minister under the Act may now be deployed against him in respect of penalties and interest in circumstances where if his VDP disclosure is valid, no penalty and interest charges may in fact be owing. The appellant emphasizes that his VDP disclosure may also expose him to prosecution, and that he is therefore entitled, as a matter of fairness, to a final determination of the validity of the disclosure.

[15] I cannot ascribe to these arguments. I say this for three reasons.

[16] The Minister has stated that if the VDP application was granted or set aside following the application for judicial review, CRA would issue a new reassessment taking relevant matters into account. Section 8 of the Information Circular speaks to the same effect. Further, subsection 220(3.1) of the *Income Tax Act* gives the Minister the authority to waive or cancel all or any portion of penalties or interest. It is also well established that the exercise of the Minister's discretion in this regard would be subject to public law scrutiny and remedies in the Federal Court (*Canada v. Addison & Leyen Ltd.*, 2007 SCC 33 at para. 10, *Canada (National Revenue) v. Sifto Canada Corp.*, 2014 FCA 140 at para. 25; *Karia v. Canada (Minister of National Revenue)*, 2005 FC 639 at paras. 8-9).

[17] Second, to accede to the appellant's argument would, effectively nullify or over-ride the power granted to the Minister under subsection 152(4) of the *Income Tax Act* to reassess "at any time". Whatever interest the appellant may have in the VDP, it is a discretionary policy issued under the authority of section 220, which grants the Minister the discretion to grant relief from interest and penalties. It remains a guideline which gives taxpayers guidance as to how the discretion might be exercised, but it cannot give rise to an estoppel (*Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.* at paras. 75, 82), freeze the operation of the Act or subordinate the statutory powers of the Minister. On the appellant's argument, filing of a VDP application would amount to an automatic stay of the Minister's powers under the Act. However, there is nothing in the VDP Circular, nor in the statutory context within which it operates, to support the argument that the appellant had a legitimate expectation that the reassessment process would be suspended pending final consideration of the VDP application.

[18] Finally, insofar as the appellant's assertion of harm arising from the Minister's resort to enforcement powers is concerned, with the exception of jeopardy orders, subsection 225.1(1) precludes enforcement action once a taxpayer has filed a notice of objection, and subsection (3) prevents the Minister from taking collection action once an appeal has been filed with the Tax Court. Any defence to potential criminal proceedings arising from his disclosure is for the sole consideration and determination of the criminal courts.

[19] Before concluding, one element of the Federal Court decision requires comment. The Federal Court Judge found that whether the December 17, 2018 proposal letter was a reviewable

decision was a question of a jurisdictional fact which should be reviewed on a standard of reasonableness.

[20] The standard of review has no relevance to the question whether a matter is a reviewable decision or order within the scope of section 2 of the *Federal Courts Act*, and we wish to make clear that our dismissal of this appeal is not an endorsement of the Federal Court's reasons in this respect.

[21] The proposal letter, in this context, is not a reviewable decision or order. While it may foreshadow the Minister's intention to reassess, it did not determine any of the taxpayer's rights, substantive or procedural (*Air Canada v. Toronto Port Authority et al.*, 2011 FCA 347 at paras. 26-27; *Chekosky v. Canada (Revenue Agency)*, 2019 FC 841 at para. 26; *Landriault v. Canada (Attorney General)*, 2016 FC 664 at para. 21).

[22] The appeal should be dismissed with costs.

“Donald J. Rennie”

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J.A.

“I agree  
Johanne Gauthier J.A.”

“I agree  
George R. Locke J.A.”



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE ANNIS FROM THE FEDERAL COURT DATED MARCH 29, 2019, DOCKET T-130-19)**

**DOCKET:** A-156-19

**STYLE OF CAUSE:** SAM PRINCE v. MINISTER OF NATIONAL REVENUE AND CANADA REVENUE AGENCY

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** JANUARY 22, 2020

**REASONS FOR JUDGMENT BY:** RENNIE J.A.

**CONCURRED IN BY:** GAUTHIER J.A.  
LOCKE J.A.

**DATED:** JANUARY 31, 2020

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