Federal Court of Appeal | Cour d'appel fédérale

**Date: 20220602**

**Docket: A-175-21**

**Citation: 2022 FCA 101**

**CORAM:** **STRATAS J.A.**
**RENNIE J.A.**
**LASKIN J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Appellant**

**and**

**IRIS TECHNOLOGIES INC.**

**Respondent**

Heard at Toronto, Ontario, on June 2, 2022.
Judgment delivered from the Bench at Toronto, Ontario, on June 2, 2022.

REASONS FOR JUDGMENT OF THE COURT BY: RENNIE J.A.

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**REASONS FOR JUDGMENT OF THE COURT**
**(Delivered from the Bench at Toronto, Ontario, on June 2, 2022).**

**RENNIE J.A.**

[1] Iris Technologies Inc. was audited and assessed by the Minister of National Revenue under the *Excise Tax Act*, R.S.C. 1985, c. E-15 [ETA]. In response, Iris filed a notice of application in the Federal Court seeking three declarations: it was denied procedural fairness in the audit and assessment process, there was no evidentiary foundation upon which an assessment

could be issued under the ETA, and the assessments were issued for the improper purpose of depriving the Federal Court of jurisdiction to hear administrative law grievances raised by Iris in a related application. The Attorney General moved to strike out the application. The Prothonotary dismissed the Attorney General's motion, a decision which was sustained on appeal to the Federal Court (2021 FC 597 *per* McDonald J.). The Attorney General now appeals to this Court.

[2] An application for judicial review will be struck out when it is bereft of any possibility of success (*Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 47 and 91 [*JP Morgan*]). In applying this standard, a court is to read the application holistically and realistically with a view to determining the real essence of the application (at para. 49).

[3] Cloaking grievances in administrative law language and remedies does not necessarily make them such. A court must look beyond the words used. This is particularly so in the context of challenges to assessments under the ETA or *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) where Parliament has established a specialized court and system for tax appeals, and has expressly excluded the judicial review jurisdiction of the Federal Court where an appeal lies from an assessment (*Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 12; *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18(5); *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, [2007] 2 S.C.R. 793); *JP Morgan*, above.

[4] The Attorney General submits that the judge failed to recognize that the true essence of Iris' application for judicial review was an attack on the validity of the assessments, a matter within the exclusive jurisdiction of the Tax Court of Canada. Further, the Attorney General says that the judge failed to recognize that the Minister had no discretion with respect to assessments of net tax under the Act. The Attorney General also argues that the declarations of fact sought in the application are not cognizable administrative law remedies.

[5] Iris submits that the judge did not err in finding that the essence of the application was not a collateral attack on the assessments. Iris asserts that it is advancing cognizable administrative law claims within the jurisdiction of the Federal Court. It points to sections 18 and 18.1 of the *Federal Courts Act*, and Rule 64 of the *Federal Courts Rules*, S.O.R./98-106, which grant the Federal Court a broad power to supervise the exercise of ministerial discretion and to grant declaratory relief.

[6] The answer to the question as to the essential character of an application is a question of law, reviewable on a correctness standard (*McCain Foods Limited v. J.R. Simplot Company*, 2021 FCA 4, [2021] F.C.J. No. 37 (Q.L.) at para. 65; *744185 Ontario Inc. v. Canada*, 2020 FCA 1, 441 D.L.R. (4th) 564 at para. 49). When the grounds of review cited in this application are situated in the context of the legislative mandate of the Minister under the ETA and the respective jurisdictions of the Tax Court and the Federal Court, we conclude that the notice of application is, in essence, a collateral challenge to the validity of the assessments issued under the ETA, a matter within the exclusive jurisdiction of the Tax Court of Canada. The application also seeks declarations that are of no practical effect. As such, the application is bereft of any

possibility of success. We would therefore allow the appeal, set aside the Order of the Federal Court, grant the motion and strike out the application.

[7] I turn to the specific declarations requested in the notice of application.

[8] Iris seeks a declaration that the Minister breached procedural fairness in the audit and assessment process and in not following prior policy with respect to the administration of the ETA.

[9] The question whether judicial review remedies are available for breaches of procedural fairness by the Minister in the audit and assessment process was addressed by our Court at paragraph 82 of *JP Morgan*, which merits reiteration:

> Procedural defects committed by the Minister in making the assessment are not, themselves, grounds for setting aside the assessment. To the extent the Minister ignored, disregarded, suppressed or misapprehended evidence, an appeal under the General Procedure in the Tax Court is an adequate, curative remedy. In the Tax Court appeal, the parties will have the opportunity to discover and present documentary and oral evidence, and make submissions. Procedural rights available later can cure earlier procedural defects [citations omitted].

[10] As a component of its procedural fairness argument, Iris asserts that in conducting the audit and assessment the Minister departed from Canada Revenue Agency policy. Departures from prior policy may give rise to legitimate expectations arguments, but they cannot make a decision to assess or the assessment itself, invalid. The Minister is bound to apply the ETA irrespective of policy considerations.

[11] The reasoning in *JP Morgan* is equally dispositive of the second declaration requested – that the assessments were made without an evidentiary foundation. Whether the assessment made by the Minister is sustained by the evidence is a question precisely within the legislative mandate of the Tax Court of Canada.

[12] The third ground of the application is the allegation that the assessments were made for the improper purpose of defeating Iris' pursuit of administrative law remedies against the assessments in the Federal Court.

[13] The mere fact that the Minister has issued an assessment does not oust the jurisdiction of the Federal Court. Where the Tax Court does not have jurisdiction to deal with the Minister's conduct or where the true purpose of the application is to seek practical relief against the exercise of a discretion, the bar in section 18.5 does not apply. That was the situation in *Canada (National Revenue) v. Sifto Canada Corp.*, 2014 FCA 140, [2014] 5 C.T.C. 26, where a judicial review was allowed in respect of penalties issued in a reassessment: see also *Dow Chemical v. Minister of National Revenue* 2022 FCA 70.

[14] Iris has not pointed to any particular motive or conduct of the Minister other than to say that the Minister issued the assessments to deprive the Federal Court of jurisdiction in the related Federal Court proceeding. Iris' complaint appears to be directed to section 18.5 of the *Federal Courts Act* and the statutory scheme itself and not with any particular conduct on the part of the Minister.

[15] There is a further problem with this ground. It seeks a declaration of fact.

[16] Declaratory relief must determine the rights of the parties. A court should not grant declarations of fact (*West Moberly First Nations v. British Columbia*, 2020 BCCA 138, 37 B.C.L.R. (6th) 232 at paras. 309-312). While determining the rights of the parties may entail findings of fact, courts do not have jurisdiction to simply declare facts, detached from the rights of the parties (*S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99 at para. 60 [*Metro Vancouver Housing*]; *1472292 Ontario Inc. (Rosen Express) v. Northbridge General Insurance Company*, 2019 ONCA 753, 96 C.C.L.I. (5th) 1 at paras. 22, 30).

[17] There is no utility in trying to parse or separate the motivation behind a decision to assess from the correctness of the assessment itself. It is a meaningless exercise, since the assessments themselves are not discretionary – the tax is either exigible as a matter of law or it is not. The Minister is responsible for enforcing the provisions of the ETA, and the fulfillment of that statutory responsibility cannot be an improper motive for the Minister to issue an assessment (*Canada v. Roitman*, 2006 FCA 266, 60 D.T.C. 6514 at para. 25; *JP Morgan* at para. 104; *Johnson v. Canada*, 2015 FCA 51, 469 N.R. 326 [*Johnson*]). Further, assessments are deemed to be valid and binding unless vacated by the Tax Court (*Iris Technologies Inc. v. Canada (National Revenue)*, 2020 FCA 117, [2020] G.S.T.C. 25 at para. 50). An allegation that the Minister acted improperly in issuing the assessment does nothing to change the assessment. Properly characterized, this ground of application is in substance a challenge to the validity of the assessment itself.

[18] A declaration is a prerogative remedy and hence discretionary. One consideration in the exercise of that discretion is whether the declaration will have any real or practical effect *(Metro Vancouver Housing* at para. 60). Here, even assuming the Federal Court had jurisdiction to review the purpose behind the decision to assess, a declaration should not issue. The assessment remains valid and binding until vacated by the Tax Court. Issuing a declaration that does not quash or vacate the assessments would serve little or no purpose (*Johnson* at para. 41). Nor will a declaration be issued where there exists an adequate alternative remedy. The declarations here will have no practical effect − they are purely academic.

[19] In light of these reasons and the disposition of this appeal, it is unnecessary to deal with the Attorney General's motion to adduce a recently issued statement of claim as fresh evidence on appeal under rule 351. The motion pursuant to Rules 76 and 303 of the *Federal Courts Rules* to amend the style of cause to change the appellant from the Minister of National Revenue to the Attorney General of Canada is granted.

[20] Therefore, the appeal is allowed and the notice of application is struck out with costs here and below.

"Donald J. Rennie"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-175-21 |
| **APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE MCDONALD OF THE FEDERAL COURT DATED JUNE 11, 2021 IN COURT FILE NO. T-768-20.** | |
| **STYLE OF CAUSE:** | ATTORNEY GENERAL OF CANADA v. IRIS TECHNOLOGIES INC. |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | JUNE 2, 2022 |
| **REASONS FOR JUDGMENT OF THE COURT BY:** | STRATAS J.A.<br>RENNIE J.A.<br>LASKIN J.A. |
| **DELIVERED FROM THE BENCH BY:** | RENNIE J.A. |

**APPEARANCES:**

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