Federal Court of Appeal | Cour d'appel fédérale

**Date: 20240228**

**Docket: A-242-22**

**Citation: 2024 FCA 37**

**CORAM:** **STRATAS J.A.**
**MONAGHAN J.A.**
**BIRINGER J.A.**

**BETWEEN:**

**EHTESHAM A RAFIQUE**

**Appellant**

**and**

**MINISTER OF NATIONAL REVENUE**

**Respondent**

Heard at Toronto, Ontario, on February 28, 2024.

Judgment delivered from the Bench at Toronto, Ontario, on February 28, 2024.

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

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**REASONS FOR JUDGMENT OF THE COURT**

**(Delivered from the Bench at Toronto, Ontario, on February 28, 2024).**

**BIRINGER J.A.**

[1] The appellant, Ehtesham Rafique, appeals an interlocutory order of the Tax Court (*per* Rossiter C.J.). The appellant brought a motion to strike the Minister's reply and have the income tax assessments for his 1994 and 1995 years vacated. The Tax Court dismissed the motion, providing oral reasons.

[2] The standards of review for the Tax Court's decision are those in *Housen v. Nikolaisen*, 2002 SCC 33: correctness for questions of law, and palpable and overriding error for questions of fact and questions of mixed fact and law where there is no extricable legal error: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at para. 79; *Canada v. Preston*, 2023 FCA 178 at para. 12. A palpable and overriding error is an error that is obvious and determinative of the outcome: *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras. 61-75.

[3] On the motion, the appellant asked for a writ of *mandamus*, a remedy that the Tax Court correctly determined it had no jurisdiction to grant: *Canada v. Dow Chemical Canada ULC*, 2022 FCA 70 at para. 89; *Federal Courts Act*, R.S.C. 1985, c. F-7, subsection 18(1). However, the Tax Court judge appropriately looked beyond that request to consider the substance of the appellant's motion, which was to have the assessments vacated. The Tax Court concluded that there was no basis to do so.

[4] The appellant submits that the Tax Court judge made errors in law in rendering the decision, by failing to admit certain evidence on the motion, by relying on certain cases regarding rule 170.1 of the *Tax Court of Canada Rules (General Procedure)*, SOR/90-688a, which the appellant views as distinguishable, and by refusing to decide on the motion the substantive issues in the tax appeal. We find these submissions to be without merit.

[5] The Tax Court judge considered whether rule 170.1 applied. As this Court explained in *Georgeson Shareholder Communications Canada Inc. v. Canada*, 2020 FCA 139 at para. 9, rule

170.1 allows a party to apply for judgment at any stage in a proceeding where "there is nothing in controversy, either regarding the facts or a fairly arguable legal issue." It may apply, for example, where there has been an admission in the pleadings.

[6] The appellant had argued that the Minister's alleged admission of failing to reconsider the appellant's assessment "with all due dispatch" following a notice of objection (as required by subsection 165(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)) warranted the assessments being vacated. The Tax Court judge disagreed, relying on applicable case law.

[7] We agree with this conclusion. As this Court has confirmed, the Minister's failure to act "with all due dispatch" is not a basis for overturning an assessment; the taxpayer's remedy is to appeal directly to the Tax Court under paragraph 169(1)(*b*) of the *Income Tax Act*: *Ford v. Canada*, 2014 FCA 257 at para. 19, citing *Bolton v. The Queen*, [1996] 3 C.T.C 3, 200 N.R. 303.

[8] The Tax Court judge rejected the appellant's other arguments to have the assessments vacated, finding that there were still several issues in controversy in the tax appeal with respect to the deductibility of expenses and the imposition of late filing penalties. While commenting on the appellant's arguments on the latter, the Tax Court judge determined that these factual and legal issues were not to be determined on an interlocutory motion but at trial. There, the relevant evidence can be weighed, the Minister's assumptions challenged, and the legal issues resolved. We see no reviewable error in this conclusion.

[9] The appellant's reliance in this Court on rules 167 and 169 as authority for the Tax Court judge to rule on the substantive issues is entirely misplaced. Those rules address the process by which judgments of the Tax Court are issued and do not provide for the disposition of an appeal on an interlocutory motion.

[10] We find no error warranting this Court's intervention. Accordingly, we will dismiss the appeal, with costs.

"Monica Biringer"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **STYLE OF CAUSE:** | EHTESHAM A RAFIQUE v. MINISTER OF NATIONAL REVENUE |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | FEBRUARY 28, 2024 |
| **REASONS FOR JUDGMENT OF THE COURT BY:** | STRATAS J.A.<br>MONAGHAN J.A.<br>BIRINGER J.A. |
| **DELIVERED FROM THE BENCH BY:** | BIRINGER J.A. |

**APPEARANCES:**

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| Ehtesham A Rafique | FOR THE APPELLANT (ON HIS OWN BEHALF) |
| Tokunbo Omisade | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Shalene Curtis-Micallef<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |