Docket: 2015-2825(IT)G

BETWEEN:

YANAÏ ELBAZ

Appellant,

and

HER MAJESTY THE QUEEN

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion heard on February 13, 2017, at Montréal, Quebec

Before: The Honourable Justice Guy R. Smith

Appearances:

Counsel for the Appellant:	Andy Noroozi
Counsel for the Respondent:	Anne Poirier

ORDER

UPON reading the notice of motion for a temporary stay of the appellant's appeal before this Court from the notices of assessment made by the Canada Revenue Agency under the *Income Tax Act* for the 2006 to 2011 taxation years, inclusively;

AND UPON reading the submissions by the parties;

The motion to stay is dismissed in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 8th day of September 2017.

"Guy Smith"

Smith J.

Citation: 2017 TCC 177
Date: 20170908
Docket: 2015-2825(IT)G

BETWEEN:

YANAÏ ELBAZ

Appellant,

and

HER MAJESTY THE QUEEN

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR ORDER

Smith, J.

I. Overview

[1] The appellant filed a motion for a temporary stay of his appeal before the Tax Court of Canada (the "Court") from the notices of assessment made by the Canada Revenue Agency (the "CRA") under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th sup.) (the "Act") for the 2006 to 2011 taxation years, inclusively.

[2] The appellant asks that the appeal be stayed pending the outcome of a criminal proceeding involving several charges related to his financial activities. Although the charges were laid against the appellant on February 14, 2013, no date had yet been set for the criminal trial when this motion was heard.

[3] Having reviewed the motion for a stay of proceedings, which is opposed by the respondent, I am of the view that the proceedings before this Court must not be stayed.

II. Nature of the tax appeal

[4] In order to situate the specific question that the Court must now address within the broader context of the notices of assessment made by the CRA, it should first be noted that the notices of assessment are based on subsection 152(7) of the Act, which provides that "[t]he Minister is not bound by a return or information supplied by or on behalf of a taxpayer" and that he "may, notwithstanding a return or information so supplied . . . , assess the tax payable under this Part". In such a case, the assessment is deemed to "be valid and binding" under subsection 152(8) of the Act.

[5] On this basis, the CRA may determine the tax liability of a taxpayer whose assets do not seem to correspond to the reported income, based on the net value of those assets. When making an assessment under subsection 152(7) of the Act, the Minister is not obligated to identify the source of the income or the origin of the assets that formed the basis of the underlying net worth assessment: *Boroumand v. The Queen*, 2015 TCC 239, at para. 69; *Hsu v. The Queen*, 2001 FCA 240, at para. 3; and *Molenaar v. The Queen*, 2004 FCA 349, at para. 4:

> [4] Once the Ministère establishes on the basis of reliable information that there is a discrepancy, and a substantial one in the case at bar, between a taxpayer's assets and his expenses, and that discrepancy continues to be unexplained and inexplicable, the Ministère has discharged its burden of proof. It is then for the taxpayer to identify the source of his income and show that it is not taxable.

[6] It will therefore be incumbent on the appellant to show that the Minister's assumptions are unfounded by identifying the various sources of his income or the origin of his assets.

[7] The appellant's arguments for a stay of proceedings are thus made within the context of a net worth assessment.

[8] In support of his motion, the appellant states that the criminal offences of which he stands accused involve four of the six years in issue in this appeal, and he submits that the issue of the existence of a source of income will be raised in both proceedings. According to him, there is therefore a factual and temporal nexus between the two proceedings.

[9] He adds that the obligation to [TRANSLATION] "testify regarding facts directly or indirectly related to the criminal accusations against [him]" (Notice of Motion, sworn statement, para. 6) would infringe upon his right to remain silent and that he would be prejudiced thereby, as he intends to invoke that right during the criminal proceedings.

[10] The appellant also submits that [TRANSLATION] "[his] testimony would not be protected by any procedural guarantees and could be used against [him] in the criminal proceedings" (Notice of Motion, sworn statement, para. 7). Given the absence of any procedural guarantees, he would thus be forced to choose between his right to remain silent in the criminal proceedings and his right to appeal to this Court.

[11] Finally, the appellant submits that, despite the legal provisions (which will be examined below) that are intended to prevent his testimony from being used against him in another proceeding (in this case, the criminal proceeding), if there is the slightest risk of prejudice, our Court should exercise its discretion and grant the stay.

III. The burden of proof

[12] The appellant also submits that an appeal before this Court calls for a higher burden of proof than a simple civil proceeding, given the presumption that the assessment is valid (as explained above).

[13] There is no doubt that the appellant will be required to testify (or at least to call witnesses) and provide evidence to satisfy the Court of the soundness of his submissions and thus "demolish" the assumptions of fact on which the notices of assessment are based, failing which the assessments will be confirmed (*Hickman Motors Ltd. v. Canada*, [1997] 2 S.C.R. 336, para. 92). That is the very nature of a tax dispute. The issue is thus to determine whether, in so doing, the appellant will suffer prejudice.

IV. The applicable law

[14] This Court has few reported cases on the issue of a temporary stay of proceedings, perhaps because decisions have been rendered on consent without ever being published.

[15] Before the Court considers a motion to stay proceedings, it must first determine whether there is a real nexus between the two disputes involving the taxpayer. If there is, the Court will consider the merits of the motion, bearing in mind that it is "an extraordinary discretionary remedy and it must be based upon compelling reasons" (*Imperial Oil Limited v. The Queen*, 2003 TCC 46, para. 50, and *Gregory v. The Queen*, [2001] T.C.J. No. 50 (QL) (T.C.C.)).

[16] In *Obansawin v. The Queen*, 2004 TCC 3, the appellant had instituted an action in damages before the Ontario Superior Court of Justice alleging abuse of power or abuse of process by the CRA. The Court was asked to consider a stay of proceedings pending the decision of the Superior Court. C. Miller J. wrote the following:

> [17] The overriding concern in determining whether to grant a stay, even a temporary stay such as in this case, must be how best the interests of justice are served. This is particularly difficult where proceedings are afoot in two Courts with concurrent jurisdiction. It is less problematic the less the jurisdictions overlap. In this case, the OSCJ clearly has sole jurisdiction to hear the private law claims for damages in tort actions: the Tax Court of Canada, as I have found, has sole jurisdiction to hear the substantive tax issue. There is no overlap of jurisdiction between the Tax Court of Canada and the OSCJ: the issues are separate and distinct in the two Courts.
>
> [Emphasis added]

[17] C. Miller J. then asked whether the continuance of the appeal would cause harm to the appellant (which he presented as an essential condition) and, if so, whether there would be prejudice to the opposing party as well. If the Court was of the opinion that both parties would suffer harm, it would then have to consider various "factors such as convenience, expense, the law of the transaction, parties' location and any special circumstances of the particular case" (para. 20).

[18] C. Miller J. again examined a motion to stay in *Blackmore v. The Queen*, [2012] 3 C.T.C. 2010. In that case, the taxpayer had sought a stay of his tax appeal, alleging that he would be "required to answer incriminating questions that could be used in a subsequent criminal proceeding" (para. 45). In that regard, C. Miller J. concluded that the risk of harm was minimal and that the appellant would benefit from the "protective provisions of the *Charter* [*of Rights and Freedoms*] and the *Evidence Act*" (para. 52). He also explained that a stay of the tax appeal would cause prejudice to the Crown and to "the administration of Justice" (para. 55).

[19] There are a few relevant Federal Court of Appeal decisions that must be examined in the context of this appeal. I will first review certain cases that have been brought to the attention of the Court by the respondent. They involved a stay of civil proceedings pending the conclusion of criminal proceedings.

[20] In *Obadia c. Sam Levy & Associés Inc.*, 1997 CanLII 10483 (QC C.A.), the appellant had asked for a stay of bankruptcy proceedings, alleging that his right to a fair criminal trial could be jeopardized. The Quebec Court of Appeal considered the appellant's submissions and stated as follows:

> [TRANSLATION]
>
> [11] At the hearing, counsel for the appellants acknowledged that it is incumbent on them to demonstrate the risk of jeopardizing the right to a fair trial. To that end, the Court is of the opinion that general allegations are not sufficient and that it is incumbent on the party seeking a stay, even if the cases are connected by identical factual contexts, to state the grounds for the prejudice in the conduct of the criminal defence.
>
> . . .
>
> [16] In short, granting a stay is not always the rule, and the person seeking a stay must show that the circumstances could jeopardize his or her right to a fair criminal trial. A mere possibility that the defence will be revealed is not enough in itself and does not give the circumstances the required exceptional character. Finally, it is appropriate in this case to cite section 11 of the *Criminal Code*:
>
> > No civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence.

> and to consider in this case that the goal of bankruptcy proceedings is not the collection of evidence for the criminal proceedings, but the legitimate purpose of realizing the bankrupt's assets.
>
> [Emphasis added]

[21] Subsequently, the Court of Quebec relied on *Obadia*, cited above, in *Aviva Compagnie d'assurance du Canada c. Barbeau*, 2011 QCCQ 15355, where the Court also denied a motion to stay civil proceedings pending the conclusion of criminal proceedings. After reviewing the appellant's arguments, and on the basis of *Obadia*, cited above, the Court stated:

> [TRANSLATION]
>
> [8] In short, the civil and criminal proceedings are independent and [TRANSLATION] "function in parallel". As a well-known rule, the criminal process does not stay the civil process. To obtain a stay of civil proceedings, the applicant cannot simply present a series of general, theoretical or vague allegations. The applicant must demonstrate that his or her fundamental rights could be jeopardized in the criminal proceedings if the stay of the civil proceedings is not granted.
>
> [9] In this case, regarding both the motion to stay the proceedings and the alternative relief sought, the Court finds that the defendant's motion does not satisfy the criteria defined by the case law. In reality, in the current context, the elements raised by the defendant are primarily a hypothetical or theoretical fear, and the real potential risk is not shown.
>
> [Emphasis added]

[22] In *Bergeron c. Tremblay*, 2012 QCCA 1301 ("*Bergeron*"), the applicant was seeking a stay of his examination after defence in a civil case, as he felt that the measures imposed by the trial judge to protect his rights were insufficient and that there was a [TRANSLATION] "significant risk that information could be disclosed". The Quebec Court of Appeal, however, ruled that the measures were sufficient to protect the applicant's fundamental rights:

> [TRANSLATION]
>
> [8] Under section 11 of the *Criminal Code*, no civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence.

> Consequently, the rule is that [TRANSLATION] "the criminal process does not stay the civil process"; to be exempted from that rule, the applicant must show that, unless the civil case is stayed, his or her fundamental right to make full answer and defence would necessarily be threatened or compromised.
>
> [9] In principle, the rights of the applicant in criminal proceedings brought against him or her are protected by the constitutional provisions of sections 7, 11 and 13 of the *Canadian Charter of Rights and Freedoms*. The current case law of the Supreme Court recognizes in particular three procedural guarantees regarding self-incrimination to prevent testimony that the accused must give in a civil case from then being used against him or her in criminal proceedings:
>
> > Use immunity serves to protect the individual from having the compelled incriminating testimony used directly against him or her in a subsequent proceeding. The derivative use protection insulates the individual from having the compelled incriminating testimony used to obtain other evidence, unless that evidence is discoverable through alternative means. The constitutional exemption provides a form of complete immunity from testifying where proceedings are undertaken or predominately used to obtain evidence for the prosecution of the witness. Together these necessary safeguards provide the parameters within which self-incriminating testimony may be obtained.
>
> [Emphasis added]

[23] In addition to the cases that were brought to the Court's attention, I would add *Ludmer v. Attorney General of Canada and Canada Revenue Agency*, 2015 QCCS 1218; *Ungava Mineral Exploration Inc. c. Procureure générale du Québec*, 2016 QCCS 4711; and more specifically *Gravel c. Agence du revenu du Québec*, 2016 QCCS 3578 ("*Gravel*"), where the Court declined to stay the proceedings, on the grounds that [TRANSLATION] "the objective of ensuring the accessibility and promptness of justice favours refusing the stay of proceedings" (para. 40).

[24] To complete my analysis of the case law, I will now review the relevant cases of the Federal Court of Appeal.

[25] In *Jolly Farmer Products Inc. v. The Queen*, 2007 FCA 8, several shareholders had sought a stay of their appeal pending the outcome of one of the appeals involving the corporation. At trial, the Tax Court had ordered that the

shareholders' appeals be heard immediately after that of the corporation and that all examinations for discovery be completed before a certain date.

[26] The decision was appealed to the Federal Court of Appeal, and Richard C.J. (as he then was) noted that it was an appeal from an interlocutory order on procedural matters, not a substantive matter involving the shareholders and the corporation. He added that:

> [13] The relevant test to be applied to an application for a stay is set out in *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311. The onus lies with the Appellants to show that there is a serious issue to be tried, that they will suffer irreparable harm and that the balance of convenience favours the granting of a stay.
>
> [Emphasis added]

[27] The Court then examined each element of the analysis before concluding that it had to dismiss the motion for a stay. It added that there was "also a public interest that judicial proceedings be completed within a reasonable period of time" (para. 24).

[28] More recently, in *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312 ("*Mylan*"), the respondent sought a stay of the appeal before the Federal Court of Appeal until such time as the Supreme Court of Canada had ruled on an appeal involving various pharmaceutical companies. The application for the stay was dismissed.

[29] At the Federal Court of Appeal, Stratas J.A. stated that a distinction must be made between a situation in which the Court is "forbidding another body from going ahead and exercising the powers granted by Parliament that it normally exercises" and one in which the "Court [is] deciding not to exercise its jurisdiction until some time later" (para. 5). In the former case, the criteria set out by the Supreme Court of Canada in *RJR-MacDonald*, cited above, must be met.

[30] However, according to Stratas J.A., when the request involves delaying a hearing until a later date, there is no need to apply those rigid criteria:

> [5] . . . When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear

> in decisions such as these. There is a public interest consideration - the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here. This is not to say that this Court will lightly delay a matter. It all depends on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less.
>
> [6] The conclusion that the *RJR-MacDonald* test does not apply in cases where the Court is deciding not to exercise its jurisdiction until some time later is supported by other cases in this Court: *Boston Scientific Ltd. v. Johnson & Johnson Inc.*, 2004 FCA 354; *Epicept Corporation v. Minister of Health*, 2011 FCA 209.
>
> [Emphasis added]

[31] Having concluded that there was no direct nexus between the appeal before the Federal Court of Appeal and the one before the Supreme Court of Canada, the Federal Court of Appeal dismissed the application for a stay. According to Stratas J.A., the need for a "very direct nexus between the issues" (para. 19) stems from the fact that there could be a long delay before a decision by the Supreme Court and that the Supreme Court may never even rule on the specific issue raised by the respondent before the Federal Court.

[32] A review of the case law demonstrates that an application for a stay of proceedings is based on "broad discretionary considerations" (*Mylan*, para. 5) and that the Court must in particular ask itself whether, "in all the circumstances, the interests of justice support the appeal being delayed" (*Mylan*, para. 14).

[33] At the end of the day, a stay of proceedings is to be the exception, and not the rule. The dominant criterion remains the best interests of justice (*Gravel*, para. 15).

V. Analysis and conclusion

[34] The appellant submits that there is a factual and temporal nexus between the two disputes. There is however no doubt that our Court has exclusive jurisdiction over the interpretation of the Act and that its jurisdiction in that area does not in

any way overlap with the Court of Quebec's jurisdiction over criminal proceedings. Moreover, as stated in *Obadia*, cited above, at paragraphs 11 and 16, the appeal before our Court and the criminal proceedings can proceed independently and at the same time, [TRANSLATION] "even if the cases are related to identical factual contexts" (see also *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757, para. 97).

[35] With respect to the issue of the burden of proof, I cannot agree with the submissions of the appellant, who relies on *Mascouche (Ville) c. Houle*, 1999 CanLII 13256 (QC C.A.) to argue that the presumption as to the validity of the assessments, causes him a particularly onerous prejudice in that it obliges him to provide evidence to demolish the Minister's assumptions. What is involved is a civil burden of proof requiring that the Court be satisfied on a balance of probabilities. That is the standard for all appeals before this Court.

[36] In addition, I am not satisfied that the obligation to testify in this case will infringe on the appellant's right to not testify in the criminal case. I reach this conclusion because the appellant's rights will be [TRANSLATION] "protected by the constitutional provisions of sections 7, 11 and 13 of the *Canadian Charter of Rights and Freedoms*" and because the case law recognizes several [TRANSLATION] "procedural guarantees regarding self-incrimination to prevent testimony that the accused must give in a civil case from then being used against him or her in criminal proceedings" (*Bergeron*, para. 9).

[37] The appellant has drawn the Court's attention to *R. v. Nedelcu*, 2012 SCC 59, [2012] 3 S.C.R. 311, where the Supreme Court stated that testimony given at examinations for discovery in a previous civil proceeding cannot be used "to prove guilt, i.e. to prove . . . one or more of the essential elements of the offence for which the witness is being tried" (para. 9). The Supreme Court stated that prior testimony could, however, be used for the purposes of "impeaching the witness's testimony" if the witness chose to testify at his or her criminal trial, which is distinct from the issue of the determination of guilt. In my opinion, that decision merely confirms the principle that prior testimony cannot be used to establish the guilt of the witness at his or her criminal trial.

[38] For the same reasons, I do not agree that the Court should order a stay of proceedings as soon as there is the slightest risk that evidence will be revealed. The case law in this area is clearly to the effect that a criminal court has the means to protect the rights of an accused and, in this case, those of the appellant.

[39] Before concluding, I note that a trial judge can always impose additional measures (e.g., confidentiality or sealing order) to [TRANSLATION] "further protect the accused's right to a fair trial and right to make full answer and defence" (*Bergeron*, cited above, paras. 4 and 10; and *Ménard c. Matteo*, 2012 QCCS 4899, paras. 26 to 28).

[40] Although Mr. Elbaz has not sought any corollary measures in his motion for a stay, nothing prevents him from doing so at the appropriate time, by applying to the trial judge.

[41] I am of the view that the appellant has not persuaded this Court of the merits of his motion for a stay, and accordingly, for all the foregoing reasons, the motion is dismissed.

Signed at Ottawa, Canada, this 8th day of September 2017.

"Guy Smith"

Smith J.

CITATION:	2017 TCC 177
COURT FILE NO.:	20152825(IT)G
STYLE OF CAUSE:	YANAÏ ELBAZ v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	February 13, 2017
REASONS FOR ORDER BY:	The Honourable Justice Guy R. Smith
DATE OF ORDER:	September 8, 2017

APPEARANCES:

Counsel for the Appellant:	Andy Noroozi
Counsel of the Respondent:	Anne Poirier

COUNSEL OF RECORD:

For the Appellant:

Name:	Andy Noroozi
Firm:	Starnino Mostovac Montréal, Quebec

For the Respondent:

Name:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada