Docket: 2003-24(IT)G

BETWEEN:

PINTENDRE AUTOS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Motion heard on May 28th, 2003, at Québec, Quebec

Before: The Honourable Judge Brent Paris

Appearances:

Counsel for the Appellant: Michel Beaupré

Counsel for the Respondent: Nathalie Lessard

ORDER

Upon motion by the Respondent to:

> determine a question of law, that is, whether a *fin de non recevoir* based on article 1457 of the *Civil Code of Québec* or on section 3 of the *Crown Liability and*

> *Proceedings Act* may be raised before the Tax Court of Canada on appeal from a Notice of Assessment?
>
> and, if the question of law is answered in the negative,
>
> strike out the Amended Notice of Appeal and dismiss the appeal due to the Court's lack of jurisdiction over the subject matter of the appeal and because the Amended Notice of Appeal therefore no longer discloses any reasonable grounds for appeal.

And upon hearing what was alleged by the parties;

The motion is granted and the Notice of Appeal is struck out in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 5th day of December 2003.

"B. Paris"

Paris J.

Translation certified true
on this 18th day of March 2004.

Sophie Debbané, Revisor

Citation: 2003TCC818
Date: 20031205
Docket: 2003-24(IT)G

BETWEEN:

PINTENDRE AUTOS INC.,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR ORDER

Paris, J.

[1] By this motion, the Respondent seeks the following:

(a) a determination of a question of law pursuant to paragraph 58(1)(*a*) of the *Tax Court of Canada Rules* (General Procedure) (the "*Rules*"), that is, whether a *fin de non recevoir* based on article 1457 of the *Civil Code of Québec* or on section 3 of the *Crown Liability and Proceedings Act* may be raised before the Tax Court of Canada on appeal from an assessment?

(b) in the event that the question of law is answered in the negative, an order striking out the Amended Notice of Appeal; or

(c) in the event that the question of law is answered in the affirmative, an extension of time for filing the Reply to Notice of Appeal.

[2] The Respondent is relying on the court file including the Amended Notice of Appeal filed by the Appellant on February 21, 2003.

[3] The Respondent's grounds for the motion are:

(a) the question to be determined is a question of law; and

(b) the determination of the question may dispose of the proceeding in its entirety.

[4] The Appellant opposes the motion.

[5] The Appellant argues that there has been no agreement between the parties on the facts to be taken into account by the Court and, therefore, that the Respondent's motion should not be heard. It argues that the determination of a question of law can be made only after a factual foundation for the determination has been established. Because *Rule* 58(2) provides that no evidence is admissible on that kind of application, except with leave of the Court or on consent of the parties, neither of which condition has been fulfilled in this case, the Appellant submits that the motion cannot proceed.

[6] However, it is not necessary in all applications to the Court for a determination of a question of law that there be agreement on the facts giving rise to the question. In *Perera v. Canada*,[1] Létourneau J.A. made the following comments at pages 391-392:

> It may be useful to recall that Rule 474 does not confer on anyone the right to have questions of law determined before trial; it merely confers on the Court the discretion to order, on application, that such a determination be made. In order for the Court to be in a position to exercise that discretion, it must be satisfied, as was stated in the *Berneche* case, that the proposed questions are pure questions of law, that is to say questions that may be answered without having to make any finding of fact. Indeed, the purpose of the Rule is to have the questions answered before trial; it is neither to split the trial in parts nor to substitute for part of the trial a trial

[1] [1998] 3 F.C. 381 (F.C.A.).

> by affidavits.[3] This is not to say, however, that the parties must agree on the facts giving rise to the legal questions; a legal question may be based on an assumption of truth of the allegations of the pleadings provided that the facts, as alleged, be sufficient to enable the Court to answer the question.[4] (Emphasis added.)

[7] I am of the view that the Respondent's motion may proceed on the basis of the allegations in the pleadings filed by the Appellant and on the assumption of the truth of the facts alleged therein. The facts alleged in the Amended Notice of Appeal are sufficient to enable the Court to answer the question of law that is raised by the Respondent in this Motion.

[8] I am also of the opinion that the determination of the question of law raised in this application could dispose of all of the proceeding given that the question concerns the jurisdiction of the Court and its power to grant the relief sought by the Appellant.

Facts:

[9] The Appellant is a Quebec corporation that has been assessed by the Minister of National Revenue (the "Minister") under two Notices of Assessment for failing to remit source deductions withheld from the wages of its employees between December 31, 2001, and May 16, 2002. The Appellant contracted with another party ("Les Services de personnels") to have payroll services provided to it.

[10] In the Amended Notice of Appeal, the Appellant states at paragraphs 9 to 32:

> [TRANSLATION]
>
> 9. In accordance with several years of widespread practice within small, medium and large businesses, on November 23, 2001, the Appellant entered into a contract with a company carrying on business as "Les Services de personnel" for providing payroll services to it, including the payment of wages to the Appellant's employees, and the remittance of source deductions to the levels of government;
>
> 10. The duration of this contract was for a two-year period, beginning December 24, 2001;

11. Prior to "Les Services de personnels" assuming the payroll responsibilities for the Applicant's [*sic*] employees and the remittance of source deductions to the levels of government, the Appellant itself remitted source deductions on a weekly basis, which it had always done for many years in the past;

12. The amounts therefore remitted by the Appellant to the Respondent were significant and amounted to, on average, $23,000 every week;

13. Without the Appellant's knowledge, no deductions were remitted to the Respondent by "Les Services de personnels" during the period covered by the assessments in issue, that is, from December 31, 2001, to May 16, 2002, of which the Appellant was only informed by the Respondent's employees on approximately May 13, 2002;

14. The Appellant had no reason to question that such remittances were not being made and had no way of verifying this breach;

15. On the one hand, every week the Appellant received from "Les Services de personnels" a copy of a cheque indicating the remittances allegedly made to the Respondent by "Les Services de personnels";

16. On the other hand, as of March 13, 2002, one of the Respondent's employees (whose identity cannot be established on the date hereof), asked the Appellant's comptroller for confirmation that "Les Services de personnels" was processing the payroll for the Appellant's employees and was remitting source deductions to the Respondent;

17. Such written confirmation was faxed to "trust accounts" at the request of the Respondent's employee;

18. At no time during that telephone call was the Appellant's comptroller informed that source deductions for the 11 previous weeks had not yet been remitted to the Respondent;

19. On April 15, another employee of the Respondent, Mario Simard, contacted the Appellant to find out into which account the source deductions were being remitted;

20. The Appellant's comptroller reiterated that it no longer had an active account in its name because source deductions were being

withheld and remitted by "Les Services de personnels", as confirmed in a letter dated March 13;

21. At that time, the Appellant believed that all of this was due to a purely administrative misunderstanding at the Agency, not that "Les Services de personnels" was failing to remit source deductions;

22. Neither Mr. Simard nor the Respondent's other employee who had contacted the Appellant on March 13, 2002, informed the Appellant about what they clearly should have known for several weeks, that is, the failure of "Les Services de personnels" to remit source deductions;

23. Moreover, since at least the fall of 2001, it appears that "Les Services de personnels" had been the object of an inquiry, an investigation or other form of audit by the Respondent;

24. Lastly, at a meeting between the Appellant's representatives and Mario Simard, the Respondent's employee, held on May 13, 2002, Mr. Simard admitted that the Agency had made errors in the file and that it was not the first time that the Agency had dealt with "Les Services de personnels", on which he refused to elaborate;

25. It was at that May 13, 2002, meeting that the Appellant was first informed that "Les Services de personnels" had not remitted any weekly source deductions since the very beginning of 2002;

26. Yet, the Appellant was a "threshold 2" employer, that is to say, it was required to remit source deductions on a weekly basis;

27. As mentioned above, the weekly amount was approximately $23,000, therefore significant enough; the tracking of cash receipts of source deductions for the type of business run by the Appellant was very simple unlike a seasonal business, for example;

28. Therefore, the Respondent, her agents and her employees should have realized very quickly the absence of source deduction remittances with respect to the Appellant's employees, which was in stark contrast to the Appellant's practice in past years, when remittances were made regularly and in full, without omission;

29. On May 29, 2002, the Appellant received an "auditor's statement of account" stating that following an audit of payroll registers made on May 29, 2002, for the period from

> December 31, 2001, to May 16, 2002, a balance owing of $410,573.61 was due;
>
> 30. The same auditor's statement of account stated that a "fairness package will be filed for $36,127.72 in penalties and $5,668 in interest";
>
> 31. On June 7, 2002, the Appellant received confirmation that pursuant to fairness package provisions, the Respondent was waiving the penalties and interest in the case at issue;
>
> 32. The assessments in issue of June 10, 2002, were subsequently sent out;

[11] As noted by the Respondent in her Notice of Motion, the Appellant's sole ground for appealing the assessments is that the amounts assessed are not admissible in their entirety due to the [TRANSLATION] "errors and omissions by the Minister's agents" during the period covered by the assessments. This argument is set out in paragraphs 33 to 36 of the Amended Notice of Appeal:

> [TRANSLATION]
>
> 33. Clearly, had the Appellant been informed in a timely manner of the irregularities noted in its account, it would have taken the necessary steps at that time to avoid or minimize the financial losses it now faces following the assessments in issue and their confirmation by the Respondent;
>
> 34. In light of the foregoing, the Respondent, her agents and/or employees had the legal obligation to send the Appellant, by late January 2002 at the latest, the information to which it could not have access and of which it could not have been aware;
>
> 35. On March 13 and April 15, 2002, during the conversations with the Respondent's agents and/or employees, the Appellant, once again, should have been informed of the irregularities on file and of the failure by "Les Services de personnels" to remit source deductions since the start of the year;
>
> 36. The aforementioned information or disclosure errors and omissions by the Respondent and her agents and/or employees are a *fin de non recevoir* against the assessments in issue, even a substantial part thereof:

[12] In its Amended Notice of Appeal, the Appellant concludes by seeking to have the Court:

> [TRANSLATION]
>
> DECLARE inadmissible and cancelled the Respondent's debts as established in the assessment of June 10, 2002, in the amount of $369,506 covering the period from December 31, 2001, to May 16, 2002 (account number 10420 7337 RP0001) and in the assessment of June 10, 2002, in the amount of $4,887.25 covering the period from December 31, 2001, to May 16, 2002 (account number 10420 7337 RP0002);
>
> In the alternative, VARY the aforementioned assessments and reduce them to the sum of $93,806.53;
>
> In the alternative, VARY the aforementioned assessments and reduce them to the sum of $232,087.03;
>
> In the alternative, VARY the aforementioned assessments and reduce them to the sum of $350,528.57;

Respondent's Submissions

[13] The Respondent's position is that the court lacks jurisdiction to rule on the Appellant's *fin de non recevoir* because it deals with the collection of the amount assessed rather than with the amount of the tax assessed.

(1) Jurisdiction of the Tax Court of Canada

[14] The Respondent submits that, for the purposes of the assessments in issue, the jurisdiction of this court is determined by section 12 of the *Tax Court of Canada Act*[2] (the "*T.C.C.A.*") and also refers to sections 169 and 171 of the *Income Tax Act*,[3] (the "*I.T.A.*") and section 103 of the *Employment Insurance Act*,[4] (the "*E.I.A.*"). Those sections read:

Tax Court of Canada Act

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[2] R.S.C. 1985, c. T-2.

[3] R.S.C. 1985 (5th Supp.) c. 1, as amended.

[4] S.C. 1996, c. 23.

12.(1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, the *Excise Act, 2001*, Part IX of the *Excise Tax Act*, the *Income Tax Act*, the *Old Age Security Act* and the *Petroleum and Gas Revenue Tax Act*, where references or appeals to the Court are provided for in those Acts.

(2) The Court has exclusive original jurisdiction to hear and determine appeals on matters arising under the *War Veterans Allowance Act* and the *Civilian War-related Benefits Act* and referred to in section 33 of the *Veterans Review and Appeal Board Act*.

(3) The Court has exclusive original jurisdiction to hear and determine questions referred to it under section 51 or 52 of the *Air Travellers Security Charge Act*, section 97.58 of the *Customs Act*, section 204 or 205 of the *Excise Act, 2001*, section 310 or 311 of the *Excise Tax Act* or section 173 or 174 of the *Income Tax Act*.

(4) The Court has exclusive original jurisdiction to hear and determine applications for extensions of time under section 45 or 47 of the *Air Travellers Security Charge Act*, subsection 28(1) of the *Canada Pension Plan*, section 33.2 of the *Cultural Property Export and Import Act*, section 97.52 or 97.53 of the *Customs Act*, subsection 103(1) of the *Employment Insurance Act*, section 197 or 199 of the *Excise Act, 2001*, section 304 or 305 of the *Excise Tax Act* or section 166.2 or 167 of the *Income Tax Act*.

Income Tax Act

Appeal

169. Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

(*a*) the Minister has confirmed the assessment or reassessed, or
(*b*) 90 days have elapsed after service of the notice of objection and the Minister has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been mailed to the taxpayer under

> section 165 that the Minister has confirmed the assessment or reassessed.
>
> **Disposal of Appeal**
>
> 171.(1) The Tax Court of Canada may dispose of an appeal by
>
> (*a*) dismissing it; or
>
> (*b*) allowing it and
> (i) vacating the assessment,
> (ii) varying the assessment, or
> (iii) referring the assessment back to the Minister for reconsideration and reassessment.

Employment Insurance Act

> **Appeal to the Tax Court of Canada**
>
> (*Objection and Review*)
>
> 103.(1) The Commission or a person affected by a decision on an appeal to the Minister under section 91 or 92 may appeal from the decision to the Tax Court of Canada in the prescribed manner within 90 days after the decision is communicated to the person, or within such longer time as the Court may allow on application made to it within those 90 days.

[15] By virtue of those provisions, the Tax Court of Canada is given jurisdiction over appeals from assessments made under the *ITA* and the *EIA* but not over disputes regarding the collection of amounts that have been assessed under those Acts.

(2) *Fin de non recevoir*

[16] The Respondent argues that a *fin de non recevoir* like the one pleaded by the Appellant in this case is a means of preventing a creditor from bringing an action in court for the payment of a debt owed to it. The Supreme Court of Canada considered the nature of a *fin de non recevoir* in the case of *National Bank of Canada v.*

Soucisse.[5] Mr. Justice Beetz referred to the following descriptions of a *fin de non recevoir* at page 359:

> [TRANSLATION] *Fins de non-recevoir* against debts consist of certain causes which prevent a creditor from coming to court to enforce his claim.
>
> …
>
> [TRANSLATION] *Fins de non-recevoir* do not extinguish the debt, but they make it ineffective by precluding the creditor from bringing the action to which it gives rise.

[17] The *fin de non recevoir* is a kind of preliminary objection to the creditor's claim. It does not dispute the existence of the debt but rather the right of the creditor to use the courts to enforce payment of the debt. Where the plea is successful, the debt is not extinguished; the creditor is simply prevented from collecting on it.

[18] However, the Tax Court does not have the power to rule on the collection of tax liabilities. The Court can hear only appeals from assessments made under the *ITA* and *EIA* that pertain to the existence of the tax liability or to the duty to pay employment insurance premiums. The collection of tax liabilities is a separate matter altogether and because a *fin de non recevoir* is directed at preventing collection on an existing liability, the Tax Court does not have jurisdiction to grant this remedy.[6]

[19] In the only reported case in which an Appellant sought to invoke before the Tax Court a *fin de non recevoir* like the one in this case, the exception was rejected on the grounds that the Appellant had not proved the elements required to avail itself of a *fin de non recevoir*.[7] As such, the Court did not have to rule on whether a *fin de non recevoir* may have been allowed. This case, therefore, cannot be taken as authority for the position that the Court has the power to grant this remedy.

Furthermore, because the *fin de non recevoir* is based on civil liability, it can only be granted by a court having jurisdiction to entertain claims for damages, a jurisdiction that the Tax Court does not have.

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[5] [1981] 2 S.C.R. 339.

[6] See *Perley v. Her Majesty the Queen*, 97 DTC 1352.

[7] See *Alameda Holdings Inc. v. Her Majesty the Queen*, 2000 DTC 1544 (T.C.C.), and *Houde v. Her Majesty the Queen*, [2001] 2 C.T.C. 2695 (T.C.C.).

Appellant's Submissions

(1) *Fin de non recevoir*

[20] The Appellant argues that the conduct of the Minister's agents in this case was in breach of the duty imposed on them by article 1457 of the *Civil Code of Québec* (formerly article 1053 *Civil Code of Lower Canada*) and that this breach gives rise to a *fin de non recevoir* in the present case. Article 1457 provides:

> Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

[21] In civil law, civil liability may be invoked by a defendant as a (under article 1457 *et seq*. of the Civil Code) *fin de non recevoir*. A *fin de non recevoir* is a preliminary objection to the admissibility of a party's claim.

[22] The Appellant relies on the decision of the Supreme Court of Canada in *Soucisse*, *supra*, where Beetz J. said:

> One possible legal basis for a *fin de non-recevoir* is the wrongful conduct of the party against whom the *fin de non-recevoir* is pleaded. Mignault J. refers to this in the above-cited passage from *Grace and Company v. Perras (supra)* when he refers to arts. 1053 *et seq*. of the *Civil Code*. This is noted by Lemerle at p. 144 of his treatise, where he writes:
>
> > [TRANSLATION] No complaint can be based on, nor advantage derived from, one's *own action*, *negligence*, *imprudence* or *incapacity*, much less *fault*, to the detriment of another. This proposition is based on the fact [...] that no one should derive a benefit from a fault

> committed by him: on the contrary, he should repair the damage he has caused.

(2) Jurisdiction of the Tax Court of Canada

[23] The Appellant submits that the wording of section 12 of the *Tax Court of Canada Act* is broad enough to include the authority to apply a *fin de non recevoir* based on civil liability arising under article 1457 of the *Civil Code of Québec*. In particular, the Appellant relies on the following portion of section 12:

> The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act* .... (Appellant's emphasis.)

[24] The Appellant points to the different wording used in subsections 12(3) and 12(4) of the *T.C.C.A.*, which refer to "questions referred to [the Court] under ... section 173 or 174 of the *Income Tax Act* …" and "applications for extensions of time under ... section 97.52 or 97.53 of the *Customs Act* …" (Appellant's emphasis) to support its position that the phrase "arising under" the laws in issue should be given an interpretation broader than the one argued by the Respondent. In the Appellant's view, the Court has jurisdiction to determine any question with respect to the process followed by the agents of the Minister in making an assessment and has jurisdiction to determine the legality of actions or omissions by those agents in that process.

[25] To further support its position, the Appellant relies on subsection 152(1) of the *I.T.A.*, which requires that the Minister examine a taxpayer's return and assess the tax "with all due dispatch" and argues that the Minister is thereby required to exercise care in the assessment process. Failure to exercise due care in the assessment process could give rise to an appeal over which the Tax Court would have jurisdiction.

[26] The Appellant is seeking to have the Court apply section 12 of the *Interpretation Act* in determining the scope of the Tax Court's jurisdiction. That section reads:

> *Enactments Remedial*
>
> Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[27] The Appellant submits that the words "matters arising under" the laws in issue would include questions relating to any element that would throw light on the circumstances surrounding the establishment of a taxpayer's tax liability.

[28] The Appellant refers the Court to *Manke v. Canada*[8] and to *Ramsay v. Canada*[9] in which this Court found it had jurisdiction to hear appeals dealing with the issue of whether the Appellants were entitled to a credit for source deductions withheld from their wages but not remitted by their employer. The Respondent in those cases argued that the Court lacked jurisdiction to decide those issues because they related to the payment of the tax liability and not to the actual assessment of the liability.

[29] The Appellant contends that it is appealing the Minister's calculation of credits relating to its source deductions and that the Court has jurisdiction over the appeal on the same reasoning applied in *Manke* and *Ramsay*, *supra*.

[30] Finally, the Appellant submits that it would be in the interest of procedural efficiency and the sound administration of justice to allow its appeal to proceed in this Court. Otherwise, the Appellant would have to commence identical proceedings in the Federal Court or Superior Court of Québec.

Analysis

[31] The issue in this motion is whether the Court has jurisdiction to rule on a *fin de non recevoir* that was pleaded by the Appellant and based on an alleged breach by the Minister's agents of article 1457 of the *Civil Code of Québec*.

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[8] [1998] T.C.J. No. 759.

[9] [2000] T.C.J. No. 606.

[32] The Tax Court of Canada is a Court created by the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2 as amended. Although the Court is a "superior court of record" under section 3 of the *T.C.C.A.*, this does not mean that the Court has a jurisdiction equivalent to a superior court of a province. In *Puerto Rico v. Hernandez*,[10] the Supreme Court of Canada dealt with a question relating to the jurisdiction of the Federal Court, which is also a statutory Court. At pages 232 and 233, Mr. Justice Pigeon said:

> I do not suggest that the concluding words of s. 3 of the *Federal Court Act*: "shall continue to be a superior court of record having civil and criminal jurisdiction" are to be read as making, in federal matters, the Federal Court a "superior court" within the same meaning of that expression as applied to the superior courts of the provinces, that is courts having jurisdiction in all cases not excluded from their authority or, as Ritchie C.J. put it in *Valin v. Langlois* [(1879), 3 S.C.R. 1] at p. 19, "Courts, bound to take cognizance of and execute all laws …". … In view of all this, it appears to me that the Federal Court is a "superior court" in the sense of a court having supervisory jurisdiction. This is a meaning often used, as appears from the numerous authorities reviewed in *Re Macdonald* [[1930] 2 D.L.R. 177] and it is significant that such jurisdiction is conferred by the Act.

[33] The Tax Court's enabling statute gives it exclusive jurisdiction over appeals to the Court on matters arising under the *Income Tax Act* and the *Employment Insurance Act*, *inter alia*, "where references or appeals to the Court are provided for in those Acts (s. 12 *T.C.C.A.*).[11] The reference to the appeal provisions contained in those Acts restricts the jurisdiction of the Tax Court to appeals from assessments.[12] The Appellant's arguments in support of a broader interpretation of the Court's jurisdiction fail to take into account that wording.

[34] In *MacMillen Holdings Limited v. M.N.R.*,[13] Rip J. (as he then was) stated:

> Section 12 of the *Tax Court of Canada Act* grants this Court original jurisdiction to hear and determine appeals on matters

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[10] [1975] 1 S.C.R. 228.

[11] Section 12 of the *T.C.C.A.* confers jurisdiction on the Tax Court in respect of matters not relevant to the question at issue and includes jurisdiction to hear and dispose of other matters.

[12] In the case of the *EIA*, the Court is also given jurisdiction to hear appeals from determinations on questions relating to a person's employment but that category of appeal is not material for the purposes of this motion given that no determination by the Minister has been contested by the Appellant.

[13] 87 DTC 585, at pages 591-592.

> arising under the Act and other statutes. . . . The due exercise of this Court's jurisdiction on matters arising under the Act is to hear and determine an appeal from a tax assessment. I cannot overemphasize that the Court's original jurisdiction is to hear and determine appeals in matters arising under the Act; an action against the Crown based on the Act, but is not an appeal from an assessment, is not an appeal arising under the Act, which is within the jurisdiction of this Court.

[35] As to the nature of an assessment, Rip J. quoted Mr. Justice Thorson in *Pure Spring Co. Ltd. v. Minister of National Revenue*:[14]

> … The assessment, as I see it, is the summation of all the factors representing tax liability, ascertained in a variety of ways, and the fixation of the total after all the necessary computations have been made.

[36] Rip J. concluded that "[a]n assessment by its very nature is a determination of liability of a taxpayer".[15]

[37] The appeals from assessments under subsection 169(1) of the *Income Tax Act* and subsection 103(1) of the *Employment Insurance Act* are appeals from the amount of the liability fixed by the assessment. The Court's jurisdiction with respect to the Minister's determination of tax liability is whether the amount of tax assessed is correct "based on the facts and the relevant law".[16] Recently, in *Canada (Attorney General) v. Webster*, the Federal Court of Appeal stated that the jurisdiction of the Tax Court is limited to determining whether the assessments are correct in law.[17]

[38] In this case, in pleading a *fin de non recevoir*, the Appellant is not challenging the amount of the assessments. In the Amended Notice of Appeal, the Appellant does not contest the fact that "Les Services de personnels" failed to remit source deductions that had to be remitted on behalf of the Appellant.[18]

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[14] 2 DTC 844, at page 857.

[15] *MacMillen Holdings Limited v. M.N.R.*, at page 591.

[16] *Milliron v. Canada*, 2003 F.C.A. 283.

[17] 2003 F.C.A. 388.

[18] See paragraphs 25, 35, 41, 43 and 45 of the Amended Notice of Appeal.

[39] The Appellant has not argued that the Minister erred in any respect in applying the provisions of the *Income Tax Act* or the *Employment Insurance Act* to its situation or in respect of any other essential element of the assessment. The Appellant only takes issue with the conduct of the Minister's agents in the period covered by the assessments and submits that this alleged conduct, under the Civil Code, should bar the Minister from recovering the unremitted source deductions. I agree with counsel for the Respondent that the Appellant's *fin de non recevoir* is directed at the collection of the amounts assessed rather than at any defect or error in the assessments. The Appellant is seeking to prevent the Minister from enforcing the tax liability indicated in the assessments.

[40] This is also apparent from the relief the Appellant is seeking, that is, a declaration relating to the liabilities established by the assessments:

> [TRANSLATION]
>
> **DECLARE** inadmissible and cancelled the Respondent's liabilities as established in the assessment of June 10, 2002, in the amount of $369,506 covering the period from December 31, 2001, to May 16, 2002 (account number 10420 7337 RP0001) and in the assessment of June 10, 2002, in the amount of $4,887.25 covering the period from December 31, 2001, to May 16, 2002 (account number 10420 7337 RP0002);

[41] To the extent that, in the alternative, the Appellant seeks to have the assessments reduced by its *fin de non recevoir*, the basis for the reduction is the same—the [TRANSLATION] "liabilities are inadmissible".

[42] Matters relating to the collection of tax have been held to be beyond the jurisdiction of this Court. In *Liu v. The Queen*[19] Judge Bowman (as he then was) considered the jurisdiction of this Court with respect to crediting an Appellant for source deductions withheld but not remitted by the employer and he stated at paragraph 14:

> Even if I had concluded differently it would not have been within the power of this court to declare that in determining the balance owing to the Government of Canada by Mr. Liu there should be taken into account the amount withheld from his commissions but not remitted. This court's jurisdiction, insofar as it is relevant to this case, is to hear and determine references and appeals on matters arising under the Income Tax Act. Essentially in an appeal under the Income Tax Act the question is the

[19] [1995] 2 C.T.C. 2971; [1995] T.C.J. No 594, at paragraph 14.

> correctness of an assessment or determination of loss. Here there is no issue with respect to the correctness of the assessment. The question of amount of the balance of tax owing by a taxpayer may be a matter within the jurisdiction of the Federal Court but if that court sees the substantive issue in the same manner in which I do I doubt that it could give the appellant any more relief than I can. (Emphasis added.)

[43] Nor does this Court have the power to give declaratory relief as sought by the Appellant in this case. It may dispose of income tax appeals only in the manner laid down in subsection 171(1) of the *Income Tax Act*.[20]

[44] The decision of this Court in *Alameda Holdings Limited, supra,* is not authority for the position that a *fin de non recevoir* based on article 1457 of the *Civil Code of Québec* can be granted by this Court since that question was not disposed of by the Court. The Appellant's claim in this case is basically an action against the Minister for damages resulting from the alleged misconduct of the Minister's agents. The determination of civil liability and damages is beyond the jurisdiction of this Court.

[45] For these reasons, I conclude that the question of law stated by the Respondent must be answered in the negative, that is, the Appellant cannot raise a *fin de non recevoir* based on civil liability as a ground of appeal from an assessment of tax under the *ITA* and an assessment of premiums under the *EIA*.

[46] The Respondent has asked that, in the event that the answer to the question of law submitted on this motion is negative, the Amended Notice of Appeal be struck out on the basis that it would therefore no longer disclose any reasonable grounds for appeal. The test for determining whether an action should be dismissed on this basis is known as the "plain and obvious" test: it must be plain and obvious that the Appellant's Amended Notice of Appeal discloses no reasonable grounds for appeal before it can be struck out.[21] In *Attorney General of Canada*, Estey J. stated as follows at page 740:

> ... On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that “the case is beyond doubt” ….

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[20] See *Ramsay v. Canada*, 2000 T.C.J. No. 606, at paragraph 15, and *460354 Ontario Inc. v. M.N.R.* 88 DTC 1679.

[21] *Attorney General of Canada v. Inuit Tapirisat et al.*, [1980] 2 S.C.R. 735, at page 740.

[47] Having decided that the Court does not have jurisdiction to rule on the only ground of appeal from the assessments raised by the Appellant, it is plain and obvious that its Amended Notice of Appeal discloses no reasonable ground for appeal and that it has no chance of success. Therefore, the Amended Notice of Appeal will be struck out.

[48] The Respondent not having sought costs, no costs are awarded.

Signed at Ottawa, Canada, this 5th day of December 2003.

B. Paris

Paris J.

Translation certified true
on this 18th day of March 2004.

Sophie Debbané, Revisor