Citation:2009TCC107
Court File Nos.2004-4449(IT)G
2006-2188(IT)G
2005-3091(IT)G

TAX COURT OF CANADA

BETWEEN:

ROY GOULD and GUISEPPE (JOE) FIORANTE,

Appellants,

-AND -

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT
Delivered orally from the Bench by Justice B. Paris on January 30, 2009, 701 West Georgia Street, Vancouver, British Columbia

APPEARANCES**:**

Mr. J. Nitikman	For the Appellants
Msr. B. Senkpiel Ms. N. Taylor Pickering	For the Respondent
Julia Platt	The Registrar

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REASONS FOR JUDGMENT

(Edited from the transcript of Reasons delivered orally from the Bench at Vancouver, British Columbia on January 30, 2009)

JUSTICE: These are applications by the respondent to vary an Order of this Court dated November 22, 2007 in each of these appeals. The Orders provided that the hearing of the respondent's motions to amend her Replies to the Notices of Appeal would not be heard prior to the decision of this Court being rendered in the appeal of *Kathryn Kossow* 2005-1974(IT)G. The Orders were intended to and did effectively stay the proceedings in the present appeals.

The November 22nd Orders were made by Campbell Miller J. after a case management hearing held jointly in these appeals and the *Kossow* appeal. All of the appeals are from reassessments which disallowed charitable donation tax credits claimed by the taxpayers in relation to dealings with Ideas Canada Foundation. Including *Gould, Fiorante* and *Kossow,* thirteen appeals in respect of the Ideas Canada Foundation donation claims are presently before this Court. Another 1,544 Notices of Objection are being held in abeyance by the Canada Revenue Agency.

Against this backdrop Miller J. sought a means by which the thirteen appeals before this Court could be resolved most expeditiously. It was his view that this could best be accomplished by having one of the

appeals move forward quickly.

On the basis of representations made during the case management hearing, Miller J. was apparently satisfied that Ms. Kossow wanted to proceed to a hearing and would be ready to do so in June 2008.

He was also advised by counsel for Fiorante and Gould that they wished to have their appeals held in abeyance while the *Kossow* appeal proceeded because they were concerned about the costs they were facing for the estimated two to three week hearing of their appeals. Therefore, apparently in order to avoid a duplication of proceedings, and because *Kossow* was apparently able to proceed to hearing quickly, the Court ordered that the respondent's outstanding motion to amend its Replies in *Gould* and *Fiorante* be delayed until after a decision was rendered in the *Kossow* appeal.

The Court also set the *Kossow* appeal for hearing for two weeks commencing June 16th, 2008, in Toronto. However, in May 2008, that hearing was adjourned to September 8, 2008 at the request of Ms. Kossow in order to permit her to bring a two day motion dealing with the pleadings and the matters arising from the discoveries of documents and the examination for discovery of the respondent's nominee. That motion was heard on June 17th and 18th, 2008, and decided on July 18th, 2008 by Valerie Miller J.

Ms. Kossow then appealed that decision to

the Federal Court of Appeal and applied to this Court for an adjournment of the September 2008 hearing. That request was refused and Ms. Kossow applied to the Federal Court of Appeal for a stay of proceedings of her appeal in this Court pending a decision in her appeal from the July 18th, 2008 Order. The Federal Court of Appeal granted the stay.

In the course of the appeal of the July 18, 2008 Order to the Federal Court of Appeal, motions have been brought by both Ms. Kossow and the respondent. One of Ms. Kossow's motions remains outstanding and no hearing date for the motion or for the appeal itself has been fixed by the Court. The respondent submits that the delays in the hearing of *Kossow's* appeal warrant a change to the November 22nd, 2007 Orders of Campbell Miller J., and says that the respondent is prejudiced by a continuation of the stay of proceedings.

The respondent submits that the appropriate test for lifting a stay of proceedings was that set out by the Federal Court of Appeal in *Del Zotto v. Canada* [1996] F.C.J. 294. There the Court said at paragraph 12:

> "In our view, once an order for a stay is made the jurisdiction to lift it, as we have observed, is conferred by subsection 50(3) of the *Act* and, unless the circumstances be exceptional or non-controversial, that jurisdiction is to be exercised upon motion

> supported by appropriate evidence showing that the facts upon which the stay was originally granted have so changed as to justify a lifting or partial lifting of the stay."

Counsel for the respondent further submitted that once it has shown the facts upon which the original stay was granted have changed, the Court must determine whether all of the facts would still justify a stay. In other words, counsel said that the Court should not only consider the effect of the changed fact or circumstances but should look at all of the facts underlying the granting of the original stay in order to decide whether they support a stay. This would amount to a reconsideration of the stay as a whole.

Counsel for the respondent argued that the fact that the *Kossow* appeal did not proceed to a hearing in June 2008, and has now become bogged down in pre-trial procedural skirmishes, and the fact that no hearing date for the appeal itself is foreseeable for some time yet are material changes to the facts upon which the stay was granted. He submits that the change is substantial and justifies a lifting of the stay.

Furthermore, he submitted that on a consideration of all the circumstances of these appeals a stay of proceedings is not justified. He says that the appellants have not demonstrated how proceeding with their appeals would be oppressive, vexatious or harmful to them.

The only grounds on which they rely are that they would be required to fund a two-week trial part of which may ultimately take place in Toronto and thereby require them to travel away from their home and work in Vancouver. Respondent's counsel argued that expense and inconvenience are not special circumstances for granting a stay.

Furthermore, neither the appellants nor the respondent have agreed to be bound by the outcome of the *Kossow* appeal and therefore, it is not certain that a duplication of litigation will result if the stay is not maintained.

Finally counsel pointed to the prejudice he said the respondent would suffer if the stay were not lifted and the potential loss of evidence and the minister's inability to collect tax in these cases and the related objections should the appeals be decided in the respondent's favour.

Counsel for the appellants argued that the only test for lifting a stay is whether there has been a significant or extraordinary change in the facts of the case, which would warrant a change of the original order. Counsel cited the following comments of Associate Chief Justice Jerome in the Federal Court Trial Division in *Canadian Tire Corporation Limited v. Pit Row Services Ltd.* [1988] 19 C.P.R. (3rd), which were also referred to by the Federal Court of Appeal in the *Del Zotto* case. There ACJ Jerome said:

> "The relief sought is, in essence, to have me reopen or reconsider the plaintiff's application for interlocutory injunctive relief. It is obvious, of course, that that is the most extraordinary kind of disposition of any kind of matter adjudicated upon by the court. It, of course, requires material in support which would have to be also of an extraordinary nature. It is quite likely that such an application might succeed in the face of factual evidence that indicates that the factual basis for the original disposition was substantially incorrect, not simply a matter of shade of meaning or degree. It would have to be substantially different. The true facts would have to be shown to be so substantially different from the facts upon which the original disposition was made that it would be, in my opinion, extraordinary."

While the Federal Court Trial Division was dealing with an application to lift an interlocutory injunction in *Canadian Tire*, the Federal Court of Appeal in *Del Zotto* said that the principles outlined in that case were equally applicable to an application to lift a stay of proceedings. Counsel for the appellants submitted therefore that it is not open to the Court now to review any of the facts underlying the stay except those that may

have changed since the date of the orders.

Counsel for the appellant submitted that the adjournment of the *Kossow* appeal in this Court and the delays that have occurred in that matter do not constitute a change of circumstances, or if they do, were not of the extraordinary kind referred to by the Federal Court Trial Division in *Canadian Tire*. Therefore, he submitted that the stay should not be lifted.

I agree with the appellant's counsel that the focus of the test for lifting a stay is whether there has been a material change to the facts underlying the stay Order and the impact that change would have had on the decision to grant the original Order. However, I believe that there has been a material or extraordinary change to the facts that were relied upon by the court in making the November 22nd, 2007 Order.

From a reading of the transcript of the case management conference held November 16th, 2007, it is clear to me that in deciding to order the stay Campbell Miller J. placed significant weight on the fact that the *Kossow* appeal would proceed expeditiously to a hearing in June 2008. The subsequent adjournment of the hearing date and the unlikeliness that that appeal will be heard by this court anytime before late 2009, in my view, thwarts the intention behind the November 22nd Order in these appeals which was to permit a relatively short delay in the proceedings in an attempt to avoid duplication of

proceedings and the resulting expenditure of time and money by the appellants.

Now, with no certainty as to when the *Kossow* appeal will eventually be heard, the delay in these appeals takes on much more significant proportions. The delay in having the *Kossow* appeal heard is far beyond what was contemplated by the court when the order was made and I accept that such delay is prejudicial to the respondent.

Furthermore, although not referred to by the parties, I believe there has been another change of circumstance here, which should be taken into account, namely the addition of numerous procedural issues to the *Kossow* appeal since the case management conference in November 2007. At least for the present, these or similar procedural issues have not been raised in the present appeals. The inclusion of those issues in the *Kossow* appeal gives rise to the possibility that the resolution of that appeal may not be of as much assistance in resolving these appeals as it may have appeared in November 2007.

I'm aware that the appellants, in affidavits filed on these motions, indicate that they themselves would seek to raise any new issue that has been raised in *Kossow*, but at the present this has not been done. Furthermore, it appears that it may not be possible for the appellants to raise those issues, or at least some of them, given the point to which the pre-hearing

procedures have advanced already.

I find that all of these changes result in the factual underpinning of the November 22nd, 2007 Orders being no longer valid and I am satisfied that it would be in the interest of justice to allow these motions and to lift the stay of proceedings effected by those orders.

No costs of the motion were sought by the respondent and no costs are awarded.