Docket: 2017-2281(IT)I

BETWEEN:

FIONA MCCALLUM,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on August 18, 2022, at Toronto, Ontario

Before: The Honourable Mr. Justice Randall S. Bocock

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Princess Okechukwu
	Craig Maw

AMENDED JUDGMENT

WHEREAS the Court has published its reasons for judgment in this appeal on this date;

NOW THEREFORE THIS COURT ORDERS THAT:

1. The appeal with respect to the 2012 and 2013 taxation years is dismissed; and,
2. No costs are awarded.

Signed at Ottawa, Canada, this 1st day of November, 2022.

"R.S. Bocock"

Bocock J.

Citation: 2022TCC122
Date: 20221101
Docket: 2017-2281(IT)I

BETWEEN:

FIONA MCCALLUM,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

AMENDED REASONS FOR JUDGMENT

Bocock J.

I. INTRODUCTION

[1] The sole issue this Court must determine relates the retroactivity of the Minister's determination that the Appellant was no longer entitled to full child and HST credits for two benefit periods. The Minister's decision in 2015 reduced, the entitlement of the Appellant, Ms. McCallum, by one-half in base years 2012 and 2013.

II. PRELIMINARY ISSUES

[2] There are three preliminary issues. The Court explained at length at the conclusion of evidence and argument that it has no jurisdiction to determine Ms. McCallum's entitlement to the Ontario trillium benefit. This combined energy and property tax credit is entirely within the legislative, jurisprudential and judicial authority of the Province of Ontario. The relevant Acts direct taxpayers to the Ontario Court of Justice. To appeal the decision or those benefits, Ms. McCallum must go to that Court.

[3] Second, and also related to jurisdiction, is the issue of the Universal Child Care Benefit ("UCCB"). Although completely phased out in 2016, the Tax Court of Canada does not have statutory jurisdiction to hear any appeal concerning the UCCB. Section 12 of the *Tax Court of Canada Act* simply omits any grant of

authority or jurisdiction by Parliament to this Court. The Tax Court of Canada ("TCC") is a statutory Superior Court. A statutory court requires statutory authority. There is none granted to the TCC regarding the UCCB. The TCC cannot hear the appeal of that benefit.

[4] Third, there is an issue regarding GST credits for base year 2013 relating to the 2014/2015 benefit period. No GST benefit was ever paid to Ms. McCallum for that period. There was no benefit paid, no redetermination made and consequently there is no dispute. No Court can decide an issue in the absence of a dispute.

III. FACTS

[5] Now to the facts relevant to the issue the Court must decide. There is no dispute as to the facts. They were clearly and soundly presented by Ms. McCallum to the Court in an organized fashion. They are as follows:

1. In 2011, Ms. McCallum and her husband executed a separation agreement, which provided for joint custody, shared alternate parenting and mutual responsibility for their two sons.

2. The separation agreement and communications from Ms. McCallum transparently described and revealed the joint custody/shared parenting arrangement to the Canada Revenue Agency (the "CRA");

3. All communications from the CRA to Ms. McCallum throughout 2012, 2013 and 2014 acknowledged such arrangement;

4. In early 2015, Ms. McCallum's ex-husband, likely because of expansive legislative changes to the CCTB and UCCB, applied to the Minister through the CRA for a share of such benefits;

5. The CRA requested completion by Ms. McCallum of a questionnaire in 2015, citing its having "become aware" of the shared custody arrangement;

6. On June 4, 2015, Ms. McCallum, consistent with past disclosures and information provided to the CRA, again confirmed the joint custody/shared parenting arrangement as described in the longstanding separation agreement;

7. Ultimately, on various dates in late July, 2015, the Minister "re-determined" Ms. McCallum's entitlement to:

a. The CCTB for the 2012 and 2013 base years corresponding to the 2013/2014 and 2014/2015 benefit periods, respectively; through the redetermination the Minister severed the benefits in half;

b. The HST credit for the 2012 taxation year corresponding to 2013/2014 benefit period; again, the Minister cut the HST credit in half.

8. After objections were received, the Minister confirmed the re-determinations.

a) Ms. McCallum's position

[6] Ms. McCallum was balanced in her position. She acknowledges that for the base year 2014 and the corresponding 2015/2016 benefit period and all periods subsequent, the credit should be shared and she should only receive a half-benefit. She is miffed regarding the requirement to repay the 2012 and 2013 base year paid benefit because:

1. The Minister and CRA knew throughout 2012 and beyond of the shared custody/joint parenting arrangement because of her very disclosure and candor;

2. The Minister and CRA acknowledged the existence of that very arrangement;

3. Her ex-husband could not qualify for the other half of the credits in the 2013/2014 and 2014/2015 benefit periods. The one-half is simply "lost" to the benefit of her children;

4. The CRA and Minister's "discovery" of the arrangement in 2015 is not true; they knew all along and have not admitted their knowledge;

5. Serendipitous changes to legislation to broaden and expand the benefits have actually reduced the benefits to her, a person with annual income of around $30,000.00.

[7] The Court took time to explain to Ms. McCallum that fairness was not a criterion the TCC could use to interpret the correctness of the assessment.

[8] The Court stated it would examine the following refined issues:

a) Was the Minister obligated to apply the newly "recognized" joint custody to previous benefit periods?

b) Was there any consequence to the Minister having known and acknowledged the joint custody since 2012, notwithstanding the "revelational" communication in 2015?

c) If not obligated to apply the joint custody fact retroactively, was the Minister otherwise prevented from reassessing because of any relevant statutory limitation or equitable passage of time?

[9] On the final point, the Court agreed to await further brief submissions from the parties. These were received from Respondent's counsel.

IV. ANALYSIS

a) Was the Minister obligated to apply the newly "recognized" joint custody arrangement to the previous benefit periods?

[10] The Minister had no obligation to apply the newly learned facts to the previous periods. The *Income Tax Act* (the "*Act*") imposes just a few obligations to reassess.[1] Beyond that, the decision to reassess a taxpayer is discretionary.[2] Unless specifically obligated, the Minister is free to choose whether or not to do so. To that extent, Respondent's counsel overstates the case when suggesting the ability to reassess or redetermine should guide the discretion.[3] Statutory ability and compulsion should not be conflated.

[11] The *Act* does impose certain limited obligations concerning the CCTB. Under subdivision A.1, the Minister's obligation is only to redetermine overpayments arising in the first month and any subsequent month of a change in for situations described in subsections 122.61(5) to (7).

[12] Certainly, at the inception, the Minister has an obligation to assess a taxpayer. Primarily, the Minister has the obligation to assess with all due dispatch under section 152(1) of the *Act* upon receipt of a return.[4] This obligation diminishes

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[1] *Lussier v The Queen*, 1999 CanLII 329 (TCC) at para 51.
[2] *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para 96; See also *9027-4218 Québec Inc. v Canada (National Revenue)*, 2019 FC 785 at para 52 ("[t]he Minister's refusal to carry out a reassessment for a taxation year in application of subsection 152(4) of the Act is a discretionary decision.").
[3] *Jersak v. HMQ*, 2020 TCC 136.
[4] *The Queen v. Imperial Oil Ltd.*, 2003 FCA 289 at para 9.

thereafter. Once the taxation year is assessed this mandatory obligation on the Minister disappears.[5]

[13] This begs the question: although no further obligation to reassess subsists, would new information provided to the Minister revive the previous duty? Again, absent a specific enumerated obligation, discretion is not obligation. This is true generally, [6] and also specifically since it is not enumerated under the CCTB sections.[7]

[14] Cumulatively, the Minister has no obligation to apply the newly "recognized" joint custody to previous benefit periods.

b) Was there any consequence to the Minister having known and acknowledged the joint custody in 2012 despite focusing on that fact only in 2015?

[15] The law on this point is clear. The Minister's knowledge has no legal impact. It does however foment considerable inconvenience and irritation.

[16] Regarding the inconvenience and irritation, which so miffs Ms. McCallum, the Court in *Hawkes*[8] said:

> I would first observe that this Court in no way condones inconsistent assessments or conflicting information being provided to taxpayers as is virtually admitted to have happened here. Such conduct must surely be avoided if at all possible if taxpayers are to perceive the system as fair, equitable, and reasonable in application, a system with which they are expected to cooperate voluntarily.
>
> It is quite another matter, however, to say that the Minister must always be bound by his own mistakes. I do not understand that to be the established law.
>
> [Emphasis added]

[17] While the Minister does not enjoy unlimited licence to be wrong, individual taxpayers also do not benefit to the exclusion of all others because the Minister later discovers the error, omission or misrepresentation. The Minister's errors and those of her agents do not prevent a finally achieved, correct(ed) reassessment.[9]

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[5] *Armstrong v. Canada (Attorney General)*, 2006 FCA 119 at para 8.
[6] *Lussier v. The Queen*, 1999 CanLII 329 (TCC) at para 51.
[7] Subsection 152(1.2) of the *Act* states the Minister may reassess as the circumstances require.
[8] *Hawkes v. Canada* [1997], 2 CTC 133, 1996 CanLii 3936 (FCA).
[9] *Auto Maculate v. HMQ*, 2020 TCC 105 at paragraph 47.

[18] This also consistently informs the jurisdiction and ultimate object of the TCC: whether the amounts assessed are properly owing under the *Act*[10]. If ministerial error barred such a determination by the TCC it would frustrate the overarching and paramount object of the direction by Parliament in creating and empowering this Court.[11]

[19] In summary, the prior knowledge in 2012 of the joint custody arrangement cannot defeat the proper reassessment, once issued with valid and current authority.

c) If not obligated to apply the joint custody fact set, was the Minister otherwise prevented from reassessing because of any relevant statutory limitations or equitable passage of time?

[20] The issues of statutory limitations and equitable passage of time are distinct and will be analyzed accordingly.

[21] Is the time of redetermination in this appeal beyond the normal redetermination period? Within subsection 152(1.2) of the *Act*, the normal period for a determination of an amount under section 122.61 applies with the modifications that are required in the circumstances.[12] As held in *Jersak*, the normal redetermination period expires three years after the date of the initial determination.[13] Factually, the redeterminations applicable to Ms. McCallum are within the statutory periods; the statute bar to redetermination does not apply.

[22] Concerning equitable doctrines such as *laches* or detrimental reliance, the Court is lacking power to apply them even if warranted. Equitable relief is not available before the TCC. Equitable principles cannot oust the Minister's duty or ability to apply the *Act* and otherwise forego the requirements of law.[14]

[23] Analogous instances where the TCC identified its absence of equitable jurisdiction abound. Some examples follow. A taxpayer calculated his tuition tax credits based on a CRA provided form (Schedule 11) which form conflicted with provisions in the *Act*.[15] The form was incorrect. Further, the Minister reversed a

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[10] Section 169 of the *Act*.
[11] Subsection 12(1) of the *Tax Court of Canada Act*, RSC, 1985, c. T-2.
[12] *ITA, supra* note 11, s 152(1.2), 152(3.1).
[13] *Jersak v The Queen*, 2020 TCC 136 at para 23.
[14] See *Ludmer v Canada*, [1995] 2 FC 3 (FCA), 1994 CanLII 3547 (FCA) ("A public authority may be bound by its undertakings as to the procedure it will follow, but in no case can it place itself in conflict with its duty and forego the requirements of the law.")
[15] *Gallant v The Queen*, 2012 TCC 119 at paras 6-10.

taxpayer's assessment from information extracted from a successful, yet unrelated, filed objection.[16] In both cases, the courts stated the Minister's first mistake does not require it to be perpetuated because of the doctrine of estoppel.[17]

[24] Closer to the topic before the Court, in a CCTB appeal, an Order concerning "divorce granted" shared custody allowed both parents to claim the CCTB, but an agreement between the parents indicated the father would not claim the credits.[18] The Court stated the parental sharing by agreement was not permitted for CCTBs and undue hardship was not a basis for resiling from a redetermination denying the mother's claim.

[25] Regrettably, there are no available statutory provisions or equitable principles which prevent the correct redetermination this appeal from being overridden.

V. CONCLUSION

[26] The Minister, through her agents may have resisted, through Ministerial discretion, the redetermination and reassessment giving rise to this appeal. She and they did not. Instead, a correct (although perhaps onerous) and within time (although perhaps untimely) redetermination and consequent reassessments were issued. The Court has thoroughly examine the facts and law to ensure the Minister's reassessing position is correct, particularly in light of the obvious financial hardship caused for Ms. McCallum. Unfortunately for Ms. McCallum, the Minister's final assessing position, concerning the base years 2012 and 2013 and correlative benefit periods, is correct. The TCC has no jurisdiction to render a decision beyond that criterion, particularly concerning any stand-alone application of the concepts of fairness or equity. Since the Court lacks that power, it would be inappropriate, however clear in the circumstances, to inconsequentially comment on ministerial discretion as applied to Ms. McCallum's detriment.

[27] For all these reasons, the appeal is dismissed without costs.

These amended Judgment and Reasons for Judgment are issued in substitution of the Reasons for Judgment dated October 21, 2022 in order to correct the style of cause underscored thereabove.

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[16] *Kelly v The Queen*, 2011 TCC 242 at para 7.
[17] *Ibid* at para 8.
[18] *Perron v The Queen*, 2017 TCC 220 at para 9, 15 and 21.

Signed at Ottawa, Canada, this 1st day of November, 2022.

"R.S. Bocock"

Bocock J.

CITATION:	2022TCC122
COURT FILE NO.:	2017-2281(IT)I
STYLE OF CAUSE:	FIONA MCCALLUM AND HIS MAJESTY THE KING
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Randall S. Bocock
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