

Federal Court



Cour fédérale

**Date: 20160627**

**Docket: T-387-16**

**Citation: 2016 FC 726**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, June 27, 2016**

**PRESENT: The Honourable Mr. Justice Annis**

**BETWEEN:**

**6075240 CANADA INC.**

**Applicant**

**and**

**THE MINISTER OF NATIONAL REVENUE**

**Respondent**

**ORDER AND REASONS**

I. Introduction

[1] The applicant brought a motion to set aside the order of Prothonotary Tabib, dated April 18, 2016, to strike the applicant's application for judicial review. Prothonotary Tabib found that the Court lacked the jurisdiction to grant the relief sought, because it would force the Canada Revenue Agency (CRA) to act contrary to law. This motion is the subject of the present order.

[2] On February 26, 2016, the applicant filed an application for judicial review of the CRA's January 28, 2016 decision not to process the applicant's income tax returns for fiscal years 2009 and 2010.

## II. Facts

[3] After failing to file an income tax return for fiscal year 2009, the applicant received a first arbitrary CRA tax assessment on November 8, 2010, under subsection 157(7) of the *Income Tax Act* [the Act]. The three-year limitation period for reassessment was set to expire on November 8, 2013, for fiscal year 2009.

[4] As the applicant had failed to file an income tax return for fiscal year 2010 as well, it received a first arbitrary CRA tax assessment for that year on April 10, 2012. The limitation period was set to expire on April 10, 2015.

[5] On or about June 27, 2013, the applicant's accountants at Welch LLP tried to prepare and electronically submit to the CRA the income tax return for 2009. A message [error message] was then received saying: [TRANSLATION] "The return [could not be] accepted for processing because the CRA had already received it. To learn how to change and resubmit an electronic return, click 'Corrections.'"

[6] Subsequently, the CRA took collection action against the applicant, particularly in respect of the 2009 and 2010 years. The applicant then realized that the “already received” return for 2009 was in fact the arbitrary assessment issued by the CRA on November 8, 2010.

[7] On January 14, 2015, the applicant tried to resolve the situation by producing a paper version of its tax return for fiscal year 2009, which it had initially tried to submit electronically on or about June 27, 2013.

[8] On February 18, 2015, the CRA informed the applicant that, pursuant to subsection 152(4) of the Act, it could not make a reassessment for a given year unless the request was received within three years of the date of mailing of the original assessment. Thus, the CRA did not process the return filed on January 14, 2015, because the applicant’s assessment for 2009 had been made on November 8, 2010, meaning that, for a reassessment, the return should have been filed before November 8, 2013.

[9] On or about September 2, 2015, the applicant filed an income tax return with the CRA for fiscal year 2010.

[10] On January 28, 2016, in response to the applicant’s complaint as to the deceptive nature of the error message, the CRA sent a letter to the applicant saying that it was maintaining its decision not to process the return filed for fiscal year 2009. Explanations were provided.

[11] At the same time, the applicant failed to file its tax returns on time for fiscal years 2008, 2011 and 2012. But since these returns had been filed within the three-year limitation period, the CRA issued reassessments indicating that no taxes were payable for those years. The applicant was then of the view that reassessments for fiscal years 2009 and 2010 would generate credits and cancel the taxes assessed arbitrarily, as the CRA had done for fiscal years 2008 and 2011.

[12] As a result, the applicant filed an application for judicial review of the CRA's January 28, 2016 decision not to process the return filed for fiscal year 2009.

[13] On March 31, 2016, under rule 369 of the *Federal Courts Rules* (Rules), the respondent moved to strike the application for judicial review dated February 26, 2016.

[14] The applicant missed the deadline for submitting a reply record to the respondent's motion. In an affidavit, counsel for the applicant attributed this to the departure of the attorney in charge of the matter and to the simultaneous firing of her assistant. Counsel for the applicant then contacted the Court to notify it of her intent to apply for an extension of the time limit for challenging the motion to dismiss, but it was too late, because an order dismissing the application for judicial review had already been made by Prothonotary Tabib on April 18, 2016.

[15] Indeed, on April 18, 2016, Prothonotary Tabib ruled in favour of the respondent, noting that the applicant had not submitted a reply record. She found that the Court [TRANSLATION] "substantially agreed with the respondent's written submissions" and that the Court lacked

[TRANSLATION] “the jurisdiction to grant the relief sought, because it would force the respondent to act contrary to law.” The order made by Prothonotary Tabib is at the heart of this motion.

III. Standard of review

[16] The parties agree, as do I, that the order of Prothonotary Tabib should be reviewed *de novo* because it raises a determinative issue as to the outcome of the application for judicial review.

IV. Issues

[17] This appeal raises the following issues:

1. Does the three-year limitation period for reassessment apply to the assessment made by the Minister under subsection 152(7) of the Act?
2. Was the applicant misled by an erroneous message from the Minister?

V. Analysis

[18] The applicant’s response to Prothonotary Tabib’s finding that the Court could not order the Minister to do something contrary to law is that the three-year limitation period for reassessment set out in subsection 152(3.1) of the Act does not apply to assessments made by the Minister under subsection 152(7).

[19] The applicant advances an alternative argument—one not raised before the Prothonotary—asserting that it was misled by the erroneous information provided when the CRA rejected the return for 2009 that it had filed electronically on June 27, 2013, before the expiry date of the limitation period, that is, October 8, 2013.

A. *Does the three-year limitation period for reassessment apply to the assessment made by the Minister under subsection 152(7) of the Act?*

[20] The applicant argues that subsection 152(4), which imposes limitations on reassessments made after the end of the normal reassessment period defined in subsection 152(3.1), does not apply to assessments made by the Minister under subsection 152(7), which may be made if no return has been filed.

[21] This argument is based on the fact that subsection 152(3.1), which sets a normal reassessment period of three years, does not apply to subsection 152(7) because the provision is not explicitly mentioned in the introductory sentence, whereas it applies specifically to most of the remaining subsections, namely subsections 152(4), (4.01), (4.2), (4.3), (5) and (9).

[22] I disagree. Subsection 152(4) states: “The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer . . . .”

[23] An assessment made by the Minister pursuant to subsection 152(7) is an assessment “under this Part.” This wording describes the Minister’s authority to “assess the tax payable under this Part” where no return has been filed.

[24] It is worth remembering that when assessing the tax payable under subsection 152(7), the Minister makes an assessment under subsection 152(4), which includes any tax payable “under this Part.”

[25] Paragraph 152(4)(b) provides that no assessment, reassessment or additional assessment can be made after the end of the “normal reassessment period.” Subsection 152(3.1) provides that the normal reassessment period in the circumstances is the period that ends “three years after the mailing of an original notice of assessment.” The applicant is right to point out that the provision does not directly apply to subsection 152(7).

[26] However, since those assessments made under subsection 152(7) are included under subsection 152(4), it follows that a “reassessment . . . payable under this Part” refers to subsection 152(4) and that the definition in subsection (3.1) refers to an assessment made by the Minister where no return has been filed. Consequently, in accordance with subsection 152(3.1), the three-year “reassessment period” began on the day of mailing of the Minister’s assessment, that is, November 8, 2010. Thus, the applicant’s return filed in January 2015 was filed after the expiry date of the limitation period, that is, November 8, 2013.

[27] The applicant raises a somewhat similar argument that the assessment made by the Minister under subsection 152(7) is not an original assessment for the purposes of determining the “normal reassessment period,” given the mandatory language of subsections 150(1) and 152(1).

[28] Subsection 150(1) states that the taxpayer “shall” file a return of income for each taxation year, and subsection 152(1) says that the Minister “shall,” with all due dispatch, issue an assessment based on the refund payable for the year.

[29] Given the mandatory nature of these provisions, the applicant argues that once it finally filed its tax return on January 14, 2015, the Minister was required to issue a reassessment. The applicant submits that this entails a new start date for the three-year “normal reassessment period” set out in subsections 154(4) and (3.1). I do not agree that subsections 154(4) and (3.1) can be construed as meaning that the limitation period is reset when a return is filed.

[30] Moreover, at the hearing, the applicant argued that if it had taken the Minister a year to issue a reassessment in respect of the return, the normal reassessment period would not have started until January 14, 2016, the new date of mailing of the first notice of assessment. I reject this argument because it makes no sense to conclude that by delaying to file a return, the applicant could push back the expiry date of the three-year reassessment period to January 14, 2019.



[31] Consequently, I reject the applicant's argument that subsections 152(4) and (3.1) do not apply in determining the limitation period for reassessment. Since the Minister lacks jurisdiction to make a reassessment in respect of the return filed by the applicant outside of the normal reassessment period, Prothonotary Tabib did not err in finding that the Court could not require the Minister to contravene the Act by issuing a reassessment.

B. *Was the applicant misled by an erroneous message from the Minister?*

[32] As mentioned, this argument was not addressed by the Minister in his motion to strike and, as a result, was not examined by the Prothonotary. However, it was described in detail in the application, which means that the motion to strike cannot succeed unless I am satisfied that the pleading discloses no cause of action in respect of the issue at hand.

[33] The Court will not strike an application for judicial review unless it is plain and obvious that the application discloses no reasonable cause of action: *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, at paragraph 47.

[34] The applicant submits that after filing its return for 2009 electronically, it received a message from the CRA containing erroneous information that misled it into thinking that it did not have to provide a paper version of the return in order for the CRA to "receive" and examine it.

[35] The error message in question, entitled [TRANSLATION] "Delivery and validation of error messages," said:

1. the applicant's return was not accepted for processing;
  2. because the CRA had already received **it**; and
  3. to learn how to change and resubmit an electronic return, click "Corrections."
- [emphasis added]

[36] In response to the applicant's complaint as to the deceptive nature of the error message, the CRA provided the following explanation in its January 28, 2016 decision letter:

1. Assessments made under subsection 152(7) are regarded as returns received by the CRA.
2. Prior to January 1, 2014, taxpayers could not change a return electronically; as a result, returns had to be submitted in paper format.
3. Since no paper version of the amended return was received within three years of the date of mailing of the assessment made under subsection 157(7), it was impossible to process the amended return.

[37] I am not satisfied with this explanation of the error message. In my view, subsection 152(7) cannot be construed as meaning that an assessment made where no return has been filed can also be regarded as a return. I doubt that the Minister can have it both ways, that is, that he can issue an assessment under subsection 152(4) as well as file a return, which, as I understand it, can only be filed by a taxpayer, according to the Act. I therefore agree that a message indicating that the applicant's return had already been received when that was not the case can be seen as misleading.

[38] This also means that the error message and the decision letter, which rejected the electronic version because amended returns could not be filed electronically prior to January 1, 2014, can be considered erroneous. I doubt that the electronic version of the applicant's return constitutes an amended version of that return.

[39] The information in the error message regarding the process for changing an electronic return and resubmitting it to the CRA added to the confusion and could only mislead the applicant further. The error message contradicted the explanation in the decision letter to the effect that amended returns could not be filed electronically prior to 2014.

[40] No public notice was provided to support these explanations, and, more importantly, the error message contained no explanations.

[41] The applicant filed the affidavit of the accountant who received the error message. According to him, the error message indicated that the return had already been received, not that a paper version had to be filed in order for the CRA to receive and process the return. The respondent accepted these facts as true for the purposes of this proceeding.

[42] It is unclear to me under which legal authority the electronic version of the return, which was filed within the three-year limitation period, was rejected. Moreover, the explanations given in the CRA's January 28, 2016 letter seem to contain errors of interpretation regarding what constitutes a return and the conclusion that the applicant's electronic return was, as a result, an amended return.

[43] In addition to the substantive questions surrounding the issue of whether the electronic return could be rejected, there could be questions related to the correctness of the responses that may have misled the applicant into not submitting a return in paper format, or into believing that the three-year limitation period starts on the date of the assessment by the Minister.

[44] Consequently, in my view, it is not plain and obvious that the applicant's notice of application discloses no cause of action in respect of the erroneous error message or the above-described errors in the decision-maker's explanation of this message. Thus, these paragraphs from the notice of application in relation to these issues are not struck.

[45] The applicant will file an amended notice of application within 30 days of this order and remove those paragraphs related to the interpretation of the Act indicating that the three-year limitation period for reassessments under subsections 152(4) and (3.1) do not apply.

[46] Since the results of this appeal are mixed, no award of costs will be made.

**ORDER**

**THIS COURT'S JUDGMENT is that:**

1. The appeal is dismissed in respect of the Prothonotary's decision to strike the paragraphs from the notice of application, finding that the Minister cannot be ordered to contravene the Act by making a reassessment outside of the three-year limitation period;
2. The appeal is allowed and those paragraphs of the application related to the filing of the electronic return are not struck;
3. The applicant must file an amended notice of application within 30 days of this order and remove those paragraphs that must be struck;
4. No costs are awarded.

“Peter Annis”

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Judge

## APPENDIX A

*Income Tax Act*

**150 (1)** Subject to subsection (1.1), a return of income that is in prescribed form and that contains prescribed information shall be filed with the Minister, without notice or demand for the return, for each taxation year of a taxpayer,

(a) in the case of a corporation, by or on behalf of the corporation within six months after the end of the year if

**152 (1)** The Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, the interest and penalties, if any, payable and determine

(a) the amount of refund, if any, to which the taxpayer may be entitled by virtue of section 129, 131, 132 or 133 for the year; or

(b) the amount of tax, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 122.8(2) or (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year.

**(3.1)** For the purposes of subsections (4), (4.01), (4.2), (4.3), (5) and (9), the normal reassessment period for a taxpayer in respect of a taxation year is

(a) if at the end of the year the taxpayer is a mutual fund trust or a corporation

*Loi de l'impôt sur le revenu*

**150 (1)** Sous réserve du paragraphe (1.1), une déclaration de revenu sur le formulaire prescrit et contenant les renseignements prescrits doit être présentée au ministre, sans avis ni mise en demeure, pour chaque année d'imposition d'un contribuable :

a) dans le cas d'une société, par la société, ou en son nom, dans les six mois suivant la fin de l'année si, selon le cas :

**152 (1)** Le ministre, avec diligence, examine la déclaration de revenu d'un contribuable pour une année d'imposition, fixe l'impôt pour l'année, ainsi que les intérêts et les pénalités éventuels payables et détermine :

a) le montant du remboursement éventuel auquel il a droit en vertu des articles 129, 131, 132 ou 133, pour l'année;

b) le montant d'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 122.8(2) ou (3), 125.4(3), 125.5(3), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année.

**(3.1)** Pour l'application des paragraphes (4), (4.01), (4.2), (4.3), (5) et (9), la période normale de nouvelle cotisation applicable à un contribuable pour une année d'imposition s'étend sur les périodes suivantes :

a) quatre ans suivant soit la date d'envoi d'un avis de première cotisation en vertu

other than a Canadian-controlled private corporation, the period that ends four years after the earlier of the day of sending of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of sending of an original notification that no tax is payable by the taxpayer for the year; and

**(b)** in any other case, the period that ends three years after the earlier of the day of sending of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of sending of an original notification that no tax is payable by the taxpayer for the year.

**(4)** The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if

(a) the taxpayer or person filing the return

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or

(ii) has filed with the Minister a

de la présente partie le concernant pour l'année, soit, si elle est antérieure, la date d'envoi d'une première notification portant qu'aucun impôt n'est payable par lui pour l'année, si, à la fin de l'année, le contribuable est une fiducie de fonds commun de placement ou une société autre qu'une société privée sous contrôle canadien;

**b)** trois ans suivant celle de ces dates qui est antérieure à l'autre, dans les autres cas.

**(4)** Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans les cas suivants :

a) le contribuable ou la personne produisant la déclaration :

(i) soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,

waiver in prescribed form within the normal reassessment period for the taxpayer in respect of the year;

(b) the assessment, reassessment or additional assessment is made before the day that is 3 years after the end of the normal reassessment period for the taxpayer in respect of the year and

(i) is required under subsection (6) or (6.1), or would be so required if the taxpayer had claimed an amount by filing the prescribed form referred to in the subsection on or before the day referred to in the subsection,

(ii) soit a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période normale de nouvelle cotisation applicable au contribuable pour l'année;

b) la cotisation est établie avant le jour qui suit de trois ans la fin de la période normale de nouvelle cotisation applicable au contribuable pour l'année et, selon le cas :

(i) est à établir en vertu du paragraphe (6) ou (6.1), ou le serait si le contribuable avait déduit une somme en présentant le formulaire prescrit visé à ce paragraphe au plus tard le jour mentionné à ce paragraphe,

**(7)** The Minister is not bound by a return or information supplied by or on behalf of a taxpayer and, in making an assessment, may, notwithstanding a return or information so supplied or if no return has been filed, assess the tax payable under this Part.

**(7)** Le ministre n'est pas lié par les déclarations ou renseignements fournis par un contribuable ou de sa part et, lors de l'établissement d'une cotisation, il peut, indépendamment de la déclaration ou des renseignements ainsi fournis ou de l'absence de déclaration, fixer l'impôt à payer en vertu de la présente partie.

**(8)** An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.

**(8)** Sous réserve des modifications qui peuvent y être apportées ou de son annulation lors d'une opposition ou d'un appel fait en vertu de la présente partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée être valide et exécutoire malgré toute erreur, tout vice de forme ou toute omission dans cette cotisation ou dans toute procédure s'y



rattachant en vertu de la présente loi.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-387-16

**STYLE OF CAUSE:** 6075240 CANADA INC. v THE MINISTER OF  
NATIONAL REVENUE

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** MAY 18, 2016

**ORDER AND REASONS:** ANNIS J.

**DATED:** JUNE 27, 2016

**APPEARANCES:**

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