Federal Court  Cour fédérale

Date: 20140512

Docket: T-1363-13

Citation: 2014 FC 452

Montréal, Quebec, May 12, 2014

PRESENT: Richard Morneau, Esq., Prothonotary

BETWEEN:

COLASCANADA INC.

Applicant

and

MINISTER OF NATIONAL REVENUE
(AS REPRESENTED BY
THE CANADA REVENUE AGENCY)

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion by the Minister of National Revenue (Minister) to, in essence, obtain from this Court an order striking out the notice of application for judicial review filed by the applicant (ColasCanada) on August 12, 2013 (notice of application or application).

[2] In his notice of motion dated September 13, 2013, the Minister, referring to expressions found in Rule 221 of the *Federal Courts Rules* (Rules) and in *David Bull Laboratories (Canada)*

Inc. v Pharmacia Inc. (CA), [1995] 1 FC 588 at page 600 (*Pharmacia*), raises that the application is "bereft of any possibility of success" (*Pharmacia*, page 600) and that it is also "an abuse of the process" (paragraph 221(1)(*f*) of the Rules).

[3] Subsequently, on October 24, 2013, the Federal Court of Appeal rendered a leading case in *Minister of National Revenue v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 (*JP Morgan*).

[4] It is on the principles in that decision, which incorporates the test set out in *Pharmacia* at page 600 regarding motions to strike with respect to judicial review, that the Minister, in his written submissions dated February 7, 2014, focuses most of his attack (that is a more appropriate approach because Rule 221 applies only to the striking out of an action and not of an application for judicial review).

[5] Contrary to the view of ColasCanada, it does not appear to me that the Minister was wrong in referring largely to the principles set out in *JP Morgan*, even if the application in this case concerns a situation that takes place before the issuance of the assessments contrary to the case in *JP Morgan*.

[6] In fact, in *JP Morgan*, it is appropriate to consider that the Federal Court of Appeal takes the opportunity, beyond the facts in that case, to review the circumstances that justify this Court granting a motion to strike out an application for judicial review, a holistic and practical reading

of which demonstrates that the essential nature of such an application deals with a subject that falls within the exclusive jurisdiction of the Tax Court of Canada (TCC).

[7] The reason the Court took that approach in *JP Morgan* was because it sought to redirect, even hold back applications for judicial review that erroneously appear before this Court in the area of tax. In that regard, at paragraph 29 of its decision, the Federal Court of Appeal asked the following question:

> [29] Time and time again, this Court strikes out taxpayers' applications for judicial review. What explains the flow of unmeritorious applications for judicial review in the area of tax?

[8] Justice Stratas asked the question at the very beginning of the analysis. To try to respond to that and in order to define the parameters of the rest of his analysis intended to provide general guidance (see paragraph 37 of that decision), at the outset he reports a misinterpretation and misuse by various parties of the Supreme Court of Canada's comments in *Canada v Addison & Leyen Ltd.*, [2007] 2 SCR 793 (*Addison & Leyen*) where, in paragraph 8 of the decision, the Supreme Court of Canada indicated that, in certain circumstances, judicial review is available in the area of tax. In that respect, the Federal Court of Appeal stated the following at paragraph 31 in *JP Morgan*:

> [31] In legal submissions, commentaries and conferences, some tax counsel have viewed the Supreme Court's words in *Addison & Leyen* in isolation, divorced from administrative law principles. To them, the Supreme Court's words welcome taxpayers, albeit cautiously, to seek refuge in the Federal Court from the Minister's harsh or unfair treatment. Taxpayers also see cases that, on occasion, provide redress for "unfairness," "unreasonableness" and "abuses of discretion" – colloquially understood, more words of welcome. On this optimistic basis, some launch applications for judicial review. However, such a hopeful interpretation of *Addison*

> *& Leyen* is based on a lack of awareness or misunderstanding of administrative law principles.
>
> [Emphasis added.]

[9] In the next paragraph of *JP Morgan*, not surprised by a high failure rate for applications for judicial review in the area of tax, the Federal Court of Appeal referred further and as follows to harsh comments in doctrine, comments that touch the factual background underlying the application:

> [32] Almost always, applications for judicial review of administrative actions by the Minister in connection with assessments fail, especially in this Court. The failure rate now has led some to conclude that the judiciary "is simply not fulfilling" the responsibility of "controlling, through administrative law procedures, the [Minister's] exercise of government powers and… protecting common citizens from abuses" in the exercise of tax audit and assessment powers: Guy Du Pont and Michael H. Lubetsky, "The Power to Audit is the Power to Destroy: Judicial Supervision of the Exercise of Audit Powers" (2013), 61 Can. Tax J. 103 at page 120.

[10] Subsequently, and in order to properly make its point, the Court again stated the following at paragraphs 49 and 50 of its decision; the statements are inspired by, among other things, another leading case by the same Court, that is, *Canada v Roitman*, 2006 FCA 266 (*Roitman*):

> [49] Armed with sophisticated wordsmithing tools and cunning minds, skilful pleaders can make Tax Court matters sound like administrative law matters when they are nothing of the sort. When those pleaders illegitimately succeed, they frustrate Parliament's intention to have the Tax Court exclusively decide Tax Court matters. Therefore, in considering a motion to strike, the Court must read the notice of application with a view to understanding the real essence of the application.

> [50] The Court must gain "a realistic appreciation" of the application's "essential character" by reading it holistically and practically without fastening onto matters of form: *Canada v. Domtar Inc.*, 2009 FCA 218 at paragraph 28; *Canada v. Roitman*, 2006 FCA 266 at paragraph 16; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 at paragraph 78.

[11] Even though the Federal Court of Appeal in *JP Morgan* recognized at paragraphs 83 and 89 situations that would amount to reprehensible conduct by the Minister in the context of the assessment process and that would cause such situations to be outside the reach of the exclusive jurisdiction of the TCC, the Federal Court of Appeal nevertheless previously at paragraph 66 of its decision established three situations where this Court must strike out an application for judicial review (situations warranting striking). That paragraph and the preceding heading read as follows:

> **E. General principles governing when notices of application for judicial review in tax matters should be struck**
>
> [66] Administrative law authorities from this Court and the Supreme Court of Canada – including the Supreme Court's decision in *Addison & Leyen*, *supra* – show that any of the following qualifies as an obvious, fatal flaw warranting the striking out of a notice of application:
>
> > (1) the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;
> >
> > (2) the Federal Court is not able to deal with the administrative law claim by virtue of section 18.5 of the *Federal Courts Act* or some other legal principle; or
> >
> > (3) the Federal Court cannot grant the relief sought.
>
> . . .

The underlying factual background

[12] Essentially, the application was filed on August 12, 2013, after the Minister, in the context of an audit of ColasCanada, sent ColasCanada draft assessments under cover of a letter dated July 12, 2013. Moreover, the Court finds that paragraphs 3 to 6 and the corresponding footnotes in the Minister's written submissions dated February 7, 2014 (Minister's written submissions) adequately reflect the factual situation to consider for future analysis:

> 3. For the purposes of this motion only, the facts alleged in ColasCanada's notice of application are presumed to be true. Insofar as they are relevant, the facts are as follows:
>
> a) ColasCanada Inc. is a Canadian resident corporation incorporated under the *Canada Business Corporations Act*, which acts as a holding corporation.
>
> b) ColasCanada holds the shares of all the Canadian operating corporations of the Colas group, headed by Colas S.A., a French public corporation.
>
> c) The business of the Canadian operating corporations is road construction and the sale of related products.
>
> d) Colas S.A. provides technical assistance to its subsidiaries in connection with, *inter alia*, intellectual property, scientific research and development, legal, insurance, financial, audit, information technology, human resources, continuing education, equipment, communications, purchasing and environmental issues.
>
> e) ColasCanada pays a fee to Colas S.A., purportedly in respect of those services.
>
> f) In 2010, the Minister of National Revenue commenced an audit of ColasCanada's 2004 to 2007 taxation years.
>
> g) On July 12, 2013, in the course of a meeting held with representatives of ColasCanada, the Minister

provided ColasCanada with draft assessments in respect of its 2005 to 2007 taxation years.[1]

h) In the draft assessments, the Minister proposed to disallow deductions claimed in respect of the technical assistance fees, assess Part XIII tax on payments made to Colas S.A. and apply transfer pricing penalties pursuant to subsection 247(3) of the *Income tax Act*.[2]

4. In its notice of application, ColasCanada seeks judicial review in respect of the "Decision" of the Minister to proceed with the issuance of certain notices of reassessments (…)"[3], which "Decision" was communicated to ColasCanada "through the issuance of updated Draft Assessments dated July 12, 2013 (…)".[4]

5. ColasCanada raises issues which relate to the "abusive exercise by the CRA of its assessing powers"[5] and notions of procedural fairness, arguing mainly that the abundant documentation provided by ColasCanada in support of its position did not receive proper consideration by the Minister[6] and that the Minister "proposed various arbitrary grounds of reassessment of the Applicant and its affiliates".[7]

6. ColasCanada also raises issues of financial hardship in relation to the immediate payment of 50% of any amounts assessed by the Minister, pursuant to subsection 225.1(7) and (8) of the *Act*, if the notices of assessments are issued in conformity of the draft assessments.[8]

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1 The draft assessments for the taxation years ending December 31, 2005, 2006 and 2007 are found at Exhibit 1 to the Affidavit of Wei-Min Hum dated September 13, 2013, p. 7 of Respondent's motion record.

2 RSC 1985 c 1 (5th supp.).

3 Notice of application at par. 1.

4 Notice of application at par. 1 and 3(aa).

5 Notice of application at par. 3(a) and par. 3(dd).

[6] Notice of application at par. 3(a), 3(b), 3(v), 3(y), 3(bb), 3(pp) to 3(mm).

[7] Notice of application at par. 3(a) and 3(b).

[8] Notice of application at par. 3(c) and 3(nn).

[13] The actual paragraphs in the notice of application that essentially support the above factual background and that the Court is particularly mindful of read as follows:

> 1. This is an Application for judicial review and an appropriate Order or Orders in respect of the decision of the Minister of National Revenue (the "Minister") and the Canada Revenue Agency (collectively with the Minister, the "CRA"), to proceed with the issuance of certain notices of reassessment, which decision was communicated to the Applicant during a meeting held on July 12, 2013 (the "Decision"), drafts of which were provided to the Applicant in a letter dated July 12, 2013. The draft assessments were proposed to be issued under the *Income Tax Act* (Canada) (the "ITA") to ColasCanada Inc. ("ColasCanada") in respect of its 2005 to 2007 taxation years (the "Draft Assessments").
>
> . . .
>
> 3. The grounds for the Application are:
>
> Introduction
>
> (a) This Notice of Application relates to the abusive exercise by the CRA of its assessing powers in connection with an audit of ColasCanada, in the course of which (i) relevant information provided to the CRA by the Applicant in support of its position has been deliberately ignored by the CRA and (ii) the CRA has proposed various arbitrary grounds of reassessment of the Applicant and its affiliates;
>
> (b) As will be demonstrated in the next paragraphs, (i) it would have been impossible to reach the Decision in good faith had the information provided to the CRA as part of the audit been properly and impartially reviewed and taken into account in the

> decisional process and (ii) the CRA's approach to the audit of ColasCanada has been to seek to maximize the amount of the reassessment even in the absence of legal grounds;
>
> . . .
>
> The CRA's Decision to Reissue Identical Draft Assessments
>
> (aa) on July 12, 2013, in the course of a meeting with representatives of the Applicant scheduled at the request of the CRA, the CRA communicated the Decision (and its intention to proceed with the issuance of assessments in accordance with the Decision) through the issuance of updated Draft Assessments dated July 12, 2013 to ColasCanada, maintaining its position that (i) no deduction is available to ColasCanada in respect of the Technical Assistance Fees (per the CRA's previously asserted stance), and (ii) ColasCanada should be assessed Part XIII tax on payments made to Colas S.A., and further determining that (iii) ColasCanada should be liable for transfer pricing penalties pursuant to subsection 247(3) of the ITA, irrespective of the fact that ColasCanada provided the CRA with the required contemporaneous documentation within the prescribed period.

[14] Given this context, ColasCanada is primarily seeking the following remedies in its notice of application:

> 2. The Applicant makes application for:
>
> (a) an Order that the Decision, together with any subsequent and consequent actions taken in furtherance of the Decision, constitute an invalid and unlawful abuse and exercise of a statutory power under subsection 152(4) (unless otherwise indicated, all statutory references are to the ITA), which was exercised for an improper purpose, such that the Applicant is entitled to an order setting aside the Draft Assessments and protecting it from the Decision materializing into actual assessments;

(b) an Order in the nature of Prohibition that no action or proceeding be taken to collect any taxes and interest which might be assessed in consequence of proceeding as contemplated in the Decision regarding the Draft Assessments;

(c) in the alternative, an Order in the nature of *Certiorari* quashing the Decision;

. . .

Analysis

[15] After consideration, and for the following reasons, I have come to the conclusion that the notice of application based on its essential nature falls clearly within the three situations warranting striking if the notice of application is approached in a holistic and practical manner.

[16] The notice of application, in paragraph 1 specifically, with skill and in the same way as was criticized at the beginning of paragraph 49 of *JP Morgan*, mentions a decision by the Minister dated July 12, 2013, and not a notice of assessment outright.

[17] However, the heart of this decision is the communication of draft assessments to ColasCanada.

[18] It is undeniable that the combined effect of paragraph 1 and paragraph 2(a) of the notice of application is in reality and in practice to immediately challenge the said draft assessments to request that they be set aside so that they do not materialize into actual assessments.

[19] The Minister correctly pointed out the following at paragraphs 2 and 13 of his written submissions by referring to, among other things, paragraphs 2(a) to (c) of the notice of application where ColasCanada's remedies are identified:

> 2. . . . The result ColasCanada wishes to achieve in the application at bar – an order setting aside the draft assessments and protecting it from the decision materializing into actual assessments – assumes that the proposed reassessments would be incorrect, a matter which is at the heart of the Tax Court's jurisdiction. Finally, the relief being sought, which in effect is to preclude the Minister from issuing assessments, is a remedy the Federal Court cannot grant. . . .
>
> 13. . . . ColasCanada frames its notice of application as judicial review of the "decision . . . to proceed with the issuance of certain notices of reassessment"[18] while its "essential character"[19] is a pre-emptive attack on the eventual reassessments themselves. The real nature of ColasCanada's claim is revealed by the relief that it is seeking which relates directly to the eventual assessments themselves. . . .
>
> [Footnotes omitted.]

[20] In addition, the remedies sought by ColasCanada, even if they did not at that time address formal and already issued notices of assessment, as is often the case in other situations, nevertheless amount to a scenario criticized by the Supreme Court of Canada in *Addison & Leyen*, paragraph 11.

[21] At that paragraph 11, which is cited in *JP Morgan* at paragraphs 81 and 85, the Supreme Court takes issue as follows with the development of an incidental litigation system that would threaten the exclusive jurisdiction of the TCC:

> The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex

> structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.

[22] This remains relevant even if, as previously noted, ColasCanada is challenging draft assessments and not formally issued assessments. In that regard, of course, theoretically, the objection and appeal regime under the Act is still not open or available and section 18.5 of the *Federal Courts Act*, RSC 1985, c F-7, as amended, therefore cannot in theory be raised to preclude the notice of application.

[23] However, and as asked in *JP Morgan* at paragraph 83 *in fine*, does this mean that the taxpayer can proceed to Federal Court?

[24] As set out in *JP Morgan*, the answer to this question is no because later, if and when draft assessments materialize into actual assessments, the TCC's objection and appeal regime will come into play. Here, the text in paragraphs 84 and 86 of *JP Morgan* is key:

> [84] . . . A judicial review brought in the face of adequate, effective recourse elsewhere or at another time cannot be entertained . . .
>
> [86] Administrative law cases and textbooks express this principle in many different ways: adequate alternative forum, the doctrine of exhaustion, the doctrine against fragmentation or bifurcation of proceedings, the rule against interlocutory judicial reviews and the rule against premature judicial reviews. They all address the same idea: someone has rushed off to a judicial review court when adequate, effective recourse exists elsewhere or at another time.

> [Emphasis added.]
>
> [See also paragraph [91], first item, of the same decision.]

[25] Moreover, ColasCanada in its reply record to the motion under review and during its oral submissions sought to describe the Minister's alleged abuse more particularly; that is, the fact that the auditor in charge of the file apparently deliberately and in bad faith disregarded a lot of relevant information provided to the said auditor and to his team by ColasCanada in past months and years.

[26] As specified in paragraph 74 of *JP Morgan*, the taking into account of irrelevant considerations or the failure to take into account relevant considerations are not elements that are grounds for judicial review in this Court:

> [74] At one time, the taking into account of irrelevant considerations and the failure to take into account relevant considerations were nominate grounds of review – if they happened, an abuse of discretion automatically was present. However, over time, calls arose for decision-makers to be given some leeway to determine whether or not a consideration is relevant: see, *e.g.*, *Baker*, *supra* at paragraph 55; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraph 24. Today, the evolution is complete: courts must defer to decision-makers' interpretations of statutes they commonly use, including a decision-maker's assessment of what is relevant or irrelevant under those statutes: *Dunsmuir*, *supra* at paragraph 54; *Alberta Teachers' Association*, *supra* at paragraph 34. Accordingly, the current view is that these are not nominate categories of review, but rather matters falling for consideration under *Dunsmuir* reasonableness review: see *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paragraphs 53-54.

[27] Furthermore, and similarly, the Federal Court of Appeal excluded, in paragraph 82 at page 36 in *JP Morgan* as follows, the possibility of judicial review in Federal Court when the Minister is criticized for ignoring or disregarding evidence:

> [82] In each of the following situations, an appeal to the Tax Court is available, adequate and effective in giving the taxpayer the relief sought, and so judicial review to the Federal Court is not available:
>
> . . .
>
> - *Inadequate procedures followed by the Minister in making the assessment*. Procedural defects committed by the Minister in making the assessment are not, themselves, grounds for setting aside the assessment: *Main Rehabilitation Co v Canada*, 2004 FCA 403 at paragraph 7; *Webster, supra* at paragraph 20; *Queen v. The Consumers' Gas Company Ltd.*, [1987] 2 F.C. 60 at page 67 (C.A.). To the extent the Minister ignored, disregarded, suppressed or misapprehended evidence, an appeal under the General Procedure in the Tax Court is an adequate, curative remedy. In the Tax Court appeal, the parties will have the opportunity to discover and present documentary and oral evidence, and make submissions. Procedural rights available later can cure earlier procedural defects: *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330; *King v. University of Saskatchewan*, [1969] S.C.R. 678 at page 689; *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97 at paragraph 28; *Histed v. Law Society of Manitoba*, 2006 MBCA 89, 274 D.L.R. (4th) 326; *McNamara v. Ontario (Racing Commission)* (1998), 164 D.L.R. (4th) 99, 111 O.A.C. 375 (C.A.).
>
> [Emphasis added.]

[28] On the same aspect, I think that the above-noted paragraphs 74 and 82 of *JP Morgan* must lead us to disregard the safeguard mechanisms that ColasCanada says in substance and in reality (and therefore beyond the wording of paragraph 3 of the application) are sought by the said application; that is, that by *mandamus* the Court essentially orders the audit division under

the Minister to do its homework according to the assessment and conception of ColasCanada. At paragraph 42 (see also paragraphs 57 and 58 of the same submissions) ColasCanada stated the following:

> 42. . . . the Applicant does not wish to prevent the Respondent from issuing any reassessments for the taxation years in respect of a specific issue. The Applicant is, rather, seeking to have the Court put in place safeguard mechanisms that will force CRA to carry out its audit and eventual reassessments in accordance with procedural fairness. Whether the Order issued by the court is ultimately a *mandamus*, a *certiorari*, a *prohibition order* or some specially designed Order appropriate in the circumstances is of no importance. The Appellant wants the contemplated draft reassessments to be set aside and sent back for reconsideration until the completion of an audit during which the CRA (i) will review the evidence provided to it and (ii) will decide which Canadian entity of the Colas group pays technical assistance fees to Colas S.A.

[29] Furthermore, I think it should be remembered that granting such a remedy would allow ColasCanada to control when an audit file is in fact ready and might result in a notice of assessment. The efficiency and effectiveness of the tax regime cannot contemplate such an approach.

[30] Finally, to the extent that the alleged reprehensible conduct of the auditor, and in turn the Minister, does not fall under the above-mentioned principles in *JP Morgan*, it is necessary to consider that judicial review would not be the appropriate recourse, but that that abuse or reprehensible conduct would come under, for its control or sanction, an action and not an application for judicial review. At paragraph 89 in *JP Morgan*, the Federal Court of Appeal stated the following:

> [89] In the tax context, to the extent that the Minister has engaged in reprehensible conduct that is beyond the reach of the

> Tax Court's powers, adequate and effective recourses may be available by means other than an application for judicial review in the Federal Court: *Tele-Mobile*, *supra*; *Ereiser*, *supra* at paragraph 38. For example, breaches of agreements, careless, malicious or fraudulent actions, inexcusable delay, and abuses of process may be redressed by way of actions for breach of contract, regulatory negligence, negligent misrepresentation, fraud, abuse of process, or misfeasance in public office: in the tax context see, *e.g.*, *Swift v. The Queen*, 2004 FCA 316; *Leroux v. Canada Revenue Agency*, 2012 BCCA 63 at paragraph 22; *Gardner v. Canada (Attorney General)*, 2012 ONSC 1837, rev'd on another point 2013 ONCA 423; *McCreight v. Canada (Attorney General)*, 2013 ONCA 483. Whether these actually constitute adequate, effective recourses depends upon the circumstances of the particular case.
>
> [Emphasis added.]

[31] ColasCanada also noted that the Federal Court had to uphold its application because without the Court's intervention at this stage, ColasCanada would suffer irreparable harm by the fact that the future assessments would require that it immediately pay 50% of the amounts assessed even before the validity of the said assessments was reviewed in the TCC.

[32] For the following reasons argued by the Minister in his written submissions, this argument does not stand:

> 53. ColasCanada alleges that if the proposed assessments are issued, "irreparable harm will result for the Applicant from the CRA's process, even when the CRA's manifestly incorrect and abusive assessment action is ultimately proved wrong". This alleged harm would occur as a result of collection action taken by the Minister after the issuance of the proposed reassessments. Indeed, as a result of subsections 225.1(7) and (8) of the *Act*, the Minister may collect 50% of the amounts assessed to ColasCanada 90 days after issuing the notices of reassessment.
>
> 54. However, subsection 220(4) of the *Act* provides for other effective recourse against the immediate collection of these

> amounts by the Minister. Pursuant to subsection 220(4) of the *Act*, the Minister may, if she considers it advisable in a particular case, accept security for payment of any amount that is or may become payable under the Act.
>
> 55. It is premature at this time to anticipate the Minister's eventual decision on an eventual subsection 220(4) request from ColasCanada. But if the Minister did refuse to accept security for payment of 50% of the amounts that would be assessed, despite any financial hardship from immediate collection that ColasCanada might allege, the Minister's decision would be properly reviewable by this Court on administrative law principles. [75]
>
> 56. As a result, ColasCanada's application in this respect is premature.
>
> [Footnotes omitted.]

[33] Moreover, ColasCanada raised that there was a need to follow the teachings in, *inter alia*, the decisions rendered in March 2013 then on appeal on September 26, 2013, in *Sifto Canada Corp. v Minister of National Revenue*, the respective references of which are 2013 FC 214 and 2013 FC 986 (collectively, *Sifto Canada*). Note that the latter decision was appealed on October 4, 2013, docket A-341-13.

[34] I do not believe that that is the approach to take here.

[35] First, contrary to ColasCanada's assertion, the Court accepts from its reading of those decisions that in that latter case notices of assessment had been issued, which is unlike this case, a situation preceding the issuance of notices of assessment (although that situation is not central following my assessment). Furthermore, the ratio of those decisions concerns the appropriateness

of an application for judicial review that raises a breach of undertaking by the Minister. The factual situation is therefore very different from the situation before us.

[36] Second, the Federal Court in *Sifto Canada* relied on, *inter alia*, the initial decision rendered in the *JP Morgan* file, a decision that was revised by the Federal Court of Appeal in its decision dated October 24, 2013, in *JP Morgan*. Furthermore, that decision by the Federal Court of Appeal reviewed, re-discussed and re-focused several of those decisions that appear to support *Sifto Canada*.

[37] Thus, the Court finds that the above-mentioned reasons clearly establish that the notice of application falls under the three situations warranting striking set out in *JP Morgan*.

[38] To round out these ideas, it is appropriate to cite the statements in paragraphs 100 and 101 of the same decision:

> [100] Therefore, for taxpayers and their counsel, the question is not whether their clients' rights can be fully vindicated. They can. The question is how to do it consistent with proper practices and procedures, when to do it, in what forum, and by what means.
>
> [101] For some, judicial review in the Federal Court is a preferred tool of first resort. They are wrong. It is a tool of last resort, available only when a cognizable administrative law claim exists, all other routes of redress now or later are foreclosed, ineffective or inadequate, and the Federal Court has the power to grant the relief sought.

[39] Consequently, the respondent's motion to strike the notice of application will be allowed in the order, with costs.

[40] Moreover, the respondent filed, on January 13, 2014, a motion to strike directed, that time, against the affidavit of Jean-Yves Llenas dated December 23, 2013 (affidavit of Llenas).

[41] Given that at the hearing of the motion, ColasCanada indicated that it consented in general to the motion, that motion will be allowed, without costs.

ORDER

THE COURT ORDERS as follows:

1. The respondent's motion to strike the notice of application is allowed, with costs.

2. The respondent's motion to strike the affidavit of Llenas is allowed, without costs.

"Richard Morneau"

Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1363-13
STYLE OF CAUSE:	COLASCANADA INC. V MINISTER OF NATIONAL REVENUE AS REPRESENTED BY THE CANADA REVENUE AGENCY)
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