

Federal Court of Appeal



Cour d'appel fédérale

Date: 20161017

Docket: A-82-16

Citation: 2016 FCA 252

**CORAM: GAUTHIER J.A.
DE MONTIGNY J.A.
GLEASON J.A.**

BETWEEN:

RICK HORSEMAN

Appellant

and

**HER MAJESTY THE QUEEN IN RIGHT OF
CANADA AND HER MAJESTY THE QUEEN
IN RIGHT OF CANADA AS REPRESENTED
BY CANADA REVENUE AGENCY**

Respondents

Heard at Edmonton, Alberta, on October 17, 2016.
Judgment delivered from the Bench at Edmonton, Alberta, on October 17, 2016.

REASONS FOR JUDGMENT OF THE COURT BY:

DE MONTIGNY J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Edmonton, Alberta, on October 17, 2016).

DE MONTIGNY J.A.

[1] This is an appeal from a decision rendered by Justice Hansen of the Federal Court, ordering that the appellant's Statement of Claim be struck without leave to amend on the basis

that the claim disclosed no reasonable cause of action. Having carefully considered the record and the parties' submissions, the Court is of the view that this appeal ought to be dismissed.

[2] In 2011, the Minister of National Revenue sent a Notice of Assessment to the appellant in the amount of \$59,000.06 for outstanding GST under the *Excise Tax Act*. In July 2015, the Canadian Revenue Agency then issued a Requirement to Pay. In September 2015, the appellant claims that he filed a notice of objection. Then, in October 2015, the appellant filed a Statement of Claim under the Simplified Action Rules of the Federal Court, whereby he sought a declaration that the Requirement to Pay is null and void and contrary to the *Indian Act*, *Treaty No. 8* and section 35 of the *Constitution Act, 1982*, as well as damages for the amounts seized pursuant to the Requirement to Pay.

[3] The two issues before this Court are (1) the characterization of the appellant's claim and (2) the jurisdiction of the Tax Court to adjudicate the substance of the claims. The first is reviewable on the "overriding and palpable error" standard as it raises a question of mixed law and fact, while the second is subject to review on a correctness standard since it is a question of law: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[4] Pursuant to s. 18.5 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the Federal Court has no jurisdiction if an Act of Parliament expressly contemplates a right of appeal to the Tax Court of Canada. In *Canada (Minister of National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, this Court canvassed examples of situations sitting squarely within the Tax Court's exclusive jurisdiction, and found that cases raising at their very core the validity of a tax assessment fall squarely within the jurisdiction of the Tax Court of Canada. Writing for the

Court, Justice Stratas wrote that “[s]ections 165 to 169 of the Income Tax Act constitute a complete appeal procedure that allows taxpayers to raise in the Tax Court all issues relating to the correctness of the assessments” (para 82). In *Johnson v Canada*, 2015 FCA 51, the same approach was found to apply to questions flowing from the *Excise Tax Act* (at para 21).

[5] To determine whether a claim is in substance an attack on the validity of an underlying tax assessment, a court “must gain ‘a realistic appreciation’ of the [claim’s] ‘essential character’ by reading it holistically and practically without fastening onto matters of form” (*JP Morgan*, at para 50). This requires that a court “look beyond the words used, the facts alleged and the remedy sought” to satisfy itself that the claim is not a disguised attempt to do indirectly what can be done directly in another, more appropriate forum: *Canada v Roitman*, 2006 FCA 266, at para 16.

[6] In the case at bar, the Federal Court held that the “essential character” of the appellant’s claim is an indirect challenge to the validity of his 2011 tax re-assessment. In light of the facts and of the applicable case law, the Court has come to the conclusion that such a characterization does not amount to an overriding and palpable error. Even though the appellant’s claim is cast as a damage claim, the only damages sought flow directly from the tax re-assessment and seek reimbursement of monies paid in satisfaction of that re-assessment. The appellant’s claim, as pleaded, is therefore nothing but a challenge to the validity of the tax re-assessment. The constitutional dimension of the claim did nothing to alter this conclusion, nor did it serve to oust the Tax Court’s jurisdiction.

[7] Pursuant to section 19.2 of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, the Tax Court has jurisdiction to consider the constitutional validity, applicability or operability of an Act of Parliament or its regulations and can issue consequential remedies if a notice of constitutional question is properly served: see *Guindon v Canada*, 2015 SCC 41; *Grenon v Canada*, 2016 FCA 4. It is also well established that the Tax Court has jurisdiction to consider claims under s. 87 of the *Indian Act* with respect to the applicability of tax requirements, and issues involving the application of Treaty 8 and whether it contains a tax exemption: see, for ex., *Bastien (Succession de) v R*, 2011 SCC 38; *Pictou v R*, 2003 FCA 9. Such assertions are properly tested in the Tax Court, and the case law relied on by the appellant does not support the contrary proposition. If anything, many of the cases cited by the appellant confirm that questions related to the validity of tax assessments must be adjudicated by the Tax Court, irrespective of how the claim is framed. Indeed, the Supreme Court has noted the importance of maintaining the integrity and efficacy of the system of tax assessments and appeals, as well as Parliament's intent to set up a complex structure to deal with a multitude of tax-related claims whose structure relies on an independent and specialized court: see *Canada v Addison & Leyen Ltd.*, 2007 SCC 33, at para 11).

[8] For all the foregoing reasons, this Court finds that the motions judge properly characterized the appellant's claim as being an indirect challenge to a tax assessment, and that it was plain and obvious that the Tax Court has exclusive jurisdiction over such a question. As such, the appeal will be dismissed, with costs.

"Yves de Montigny"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-82-16

**APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE HANSEN
OF THE FEDERAL COURT, DATED MARCH 7, 2016, NO. T-1846-15**

STYLE OF CAUSE:

RICK HORSEMAN v. HER
MAJESTY THE QUEEN IN
RIGHT OF CANADA AND HER
MAJESTY THE QUEEN IN
RIGHT OF CANADA AS
REPRESENTED BY CANADA
REVENUE AGENCY

PLACE OF HEARING:

EDMONTON, ALBERTA

DATE OF HEARING:

OCTOBER 17, 2016

REASONS FOR JUDGMENT OF THE COURT BY:

GAUTHIER J.A.
DE MONTIGNY J.A.
GLEASON J.A.

DELIVERED FROM THE BENCH BY:

DE MONTIGNY J.A.

APPEARANCES:

Priscilla Kennedy

FOR THE APPELLANT

Donna Tomljanovic

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

DLA Piper (Canada) LLP
Barristers and Solicitors
Edmonton, Alberta

FOR THE APPELLANT

William F. Pentney
Deputy Attorney General of Canada
Edmonton, Alberta

FOR THE RESPONDENTS