Federal Court of Appeal  Cour d'appel fédérale

**Date: 20190325**

**Docket: A-68-18**

**Citation: 2019 FCA 55**

**CORAM:** **STRATAS J.A.**
**LASKIN J.A.**
**RIVOALEN J.A.**

**BETWEEN:**

**VITERRA INC.**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Toronto, Ontario, on March 20, 2019.

Judgment delivered at Ottawa, Ontario, on March 25, 2019.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: STRATAS J.A.
LASKIN J.A.

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## REASONS FOR JUDGMENT

**RIVOALEN J.A.**

[1] Viterra Inc. appeals, and the Crown cross-appeals, from the order dated February 7, 2018, pronounced by D'Arcy J. of the Tax Court of Canada (2018 TCC 29). Before the Tax Court, the appellant moved pursuant to Rule 58 of the *Tax Court of Canada Rules (General Procedure),* SOR/90-688a (the *Tax Court Rules*) for determination, before hearing, of a question on whether

reassessments by the Minister of National Revenue under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the *Excise Tax Act*) were statute-barred. The Rule 58 question reads as follows:

> Was the Minister statute barred on February 19, 2016 from assessing GST collectible totalling $640,492.69 on the supply of investment management services made by the Appellant to three pension plan trusts (assuming such supplies were made), for the monthly reporting periods ending between August 1, 2003 and July 31, 2005?

[2] The Judge declined to answer the Rule 58 question on the basis that the evidence before him was insufficient to enable him to do so.

[3] Rule 58 provides for a two-stage process. At the first stage of the process, the Court *may* grant an order that a question be determined before the hearing. Bocock J. issued such an order on November 8, 2016, allowing the question to proceed to the second stage of the process. It is the order under the second stage that is under review in this appeal.

[4] Both parties raise the issue of whether the Judge committed a reviewable error in deciding that he could not answer the question based on the record before him.

[5] The respondent raises a further question in its cross-appeal, that being whether the Judge erred in law in his interpretation of the limits on the Minister's reassessing powers under subsection 298(3) of the *Excise Tax Act*, in response to a notice of objection, after the expiry of the normal limitation period.

## I. The Standard of Review

[6] The standard of review applicable to appeals of discretionary decisions of Judges is as set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235: palpable and overriding error for questions of fact and correctness for questions of law (*Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331, at paragraph 79). The decision to make a determination under Rule 58 is discretionary and, absent an error of law, can be set aside only on the basis of palpable and overriding error (*Paletta v. Canada*, 2017 FCA 33, at paragraph 4; *3488063 Canada Inc. v. Canada*, 2016 FCA 233, at paragraphs 32-34).

[7] I am of the view that the Judge made no reviewable error in deciding that he could not answer the Rule 58 question based on the record before him.

## II. The Facts

[8] The facts at the heart of this appeal, as agreed upon by the parties, are set out in paragraphs 3 to 7 of the Judge's decision. For ease of reference, I reproduce them below.

[9] The statement of accepted facts reads as follows:

> a) the appellant was formerly known as Saskatchewan Wheat Pool ("SWP");
>
> b) SWP was a grain handling and agri-food processing and marketing company based in Regina, Saskatchewan;
>
> c) during the material times, SWP was the administrator of three separate defined benefit pension plans (the "Pension Plans");
>
> d) each of the Pension Plans was funded through a separate trust established to hold and invest the assets of the respective Pension Plans;

e) during the periods from August 1, 2003 to July 31, 2004 and August 1, 2004 to July 31, 2005 (the "Relevant Periods") SWP acquired the services of third party investment managers to manage the Pension Plans' funds (the "Investment Services");

f) during the Relevant Periods and at all material times, SWP was a GST registrant and was required to file GST returns on a monthly basis;

g) for each monthly reporting period within the Relevant Periods, SWP filed a GST return (collectively the "GST Returns"), and more than four years had elapsed before February 19, 2016 since the later of:

i. the date on which SWP was required to file its GST Return; or

ii. the date when SWP filed its GST Return;

h) in the GST Returns, SWP claimed, *inter alia*, input tax credits ("ITCs") totalling $640,492.69 for the GST paid to investment managers in respect of the Investments [*sic*] Services;

i) the Minister originally assessed SWP for the Relevant Periods on August 10, 2007 and September 17, 2008 (the "Assessments"), respectively;

j) in the Assessments, the Minister denied SWP's ITC claims on the GST paid to the investment managers in respect of the Investment Services on the basis that SWP did not acquire the Investment Services for consumption, use or supply in the course of SWP's commercial activities;

k) SWP objected to the Assessments on November 2, 2007 and December 10, 2008, respectively, and SWP and the Minister agreed to hold the objections in abeyance pending the outcome of General Motors of Canada Limited's ("GM") appeal to the Federal Court of Appeal, which dealt with a similar issue;

l) nearly seven years after the Federal Court of Appeal decided GM's appeal, the Minister issued reassessments for the Relevant Periods on February 19, 2016 (the "Reassessments");

m) in the Reassessments, the Minister allowed the ITCs totalling $640,492.69 claimed by SWP in respect of the GST paid to the investment managers on the Investment Services;

n) however, in the Reassessments, the Minister also included unreported GST collectible totalling $640,492.69 by SWP on the supply of the Investment Services by SWP to the Pension Plans; and

o) there is no allegation of SWP making misrepresentations attributable to its neglect, carelessness, or wilful default in respect of the Investment Services.

[10] The Statement of Additional Agreed Facts, as summarized by the Judge at paragraph 6, noted the following:

- The assessment issued on August 10, 2007 for the reporting periods ending between August 1, 2003 and July 31, 2004 denied input tax credits on investment services of $551,956.19.

- The assessment issued on September 17, 2008 for the reporting periods ending between August 1, 2004 and July 31, 2005 denied input tax credits on investment services of $88,536.50.

- The particulars of the reassessment issued on February 19, 2016 for the Appellant's reporting periods ending between August 1, 2003 and July 31, 2004 are as follows:

    - The Appellant was assessed GST collectible on "In-house Resources and Administration Services" of $68,043.38.

    - The Appellant was allowed input tax credits on "Investment Services" of $551,956.19.

    - The Appellant was assessed GST collectible on the "Re-supply of Investment Services" of $551,956.19.

- The particulars of the reassessment issued on February 19, 2016 for the Appellant's reporting periods ending between August 1, 2004 and July 31, 2005 are as follows:

    - The Appellant was assessed GST collectible on "In-house Resources and Administration Services" of $61,739.68.

    - The Appellant was allowed input tax credits on "Investment Services" of $88,536.50.

    - The Appellant was assessed GST collectible on the "Re-supply of Investment Services" of $88,536.50.

- The reassessments issued on February 19, 2016 did not increase the Appellant's net tax liability for the assessed periods.

[11] Finally, it was agreed that for each particular reporting period of the appellant ending between August 1, 2003 and July 31, 2005, the later of:

A. the day on or before which the appellant was required to file its GST return for the particular reporting period and

B. the day on which the appellant filed its GST return for the particular reporting period

was more than four years before February 19, 2016, the date on which the Minister reassessed the appellant for these reporting periods.

## III. The Parties' Positions

[12] Both parties submit that the Judge committed an overriding and palpable error in refusing to answer the Rule 58 question because, they submit, there was no dispute between the parties as to any material fact underpinning a determination of the Rule 58 question, and the facts before the Tax Court were sufficient to enable the Judge to answer it.

[13] The parties disagree however as to the answer that the Judge should have given to the Rule 58 question. On the one hand, the appellant submits that the question should be answered in the affirmative because it is clear from the record that there were two separate transactions being assessed. During his oral submissions, counsel for the appellant reiterated that the facts before the Judge were clear. He urged our Court to find that, considering the facts set out in paragraph 9 j) and k) above, coupled with the reasons for decision in *General Motors of Canada Ltd. v. Canada*, 2009 FCA 114, [2010] 2 F.C.R. 344 (*General Motors*), the Judge did not require any further evidence to permit him to answer the Rule 58 question in the affirmative.

[14] The appellant also asks our Court to set aside the Judge's refusal to answer the question and answer the question in the affirmative itself, rather than remit it to the Tax Court, for reasons of expediency. Counsel for the appellant advised the Court both parties had lost their files and as a result, no further evidence would be available to adduce at trial.

[15] Conversely, the respondent submits that the Rule 58 question should be answered in the negative because (1) absent the Judge's error with regard to the Minister's assessing powers when considering an objection under the *Excise Tax Act*, the Judge would have been able to answer the Rule 58 question; and (2) the facts before the Judge were sufficient to enable him to answer the Rule 58 question and to determine that the transactions the Minister considered when issuing the initial assessments were identical to those that the Minister considered when issuing the reassessments. Counsel for the respondent contends that the Minister was simply relying on and applying the change in the law, that being this Court's decision in *General Motors*, and that the Minister had re-characterized the transactions as a result of this change. The respondent maintains that the reassessments did not increase the net tax amount owing, but simply reflected the application of the recent change in the law.

[16] The respondent also argues the concept of expediency as a reason for the Judge to answer the Rule 58 question.

[17] Finally, the parties disagree with regard to the second issue, that being whether the Judge erred in law in his interpretation of the Minister's assessing powers when considering an objection under the *Excise Tax Act*. I will deal with the second issue later on in my reasons.

## IV. Analysis

### A. *Rule 58 Question*

[18] At the commencement of the hearing, the Judge informed the parties that he was concerned he could not answer the Rule 58 question with the limited evidence before him and invited the parties to submit further evidence. The parties declined the Judge's invitation. The Judge heard the parties' submissions and determined that he did not have sufficient evidence before him to answer the Rule 58 question. He ordered that the parties proceed with the trial and stated that they were free to raise the Rule 58 question with the trial judge.

[19] Central to the Judge's decision is whether there were two transactions that formed the basis of the original assessments of the appellant's net tax, or only one, which was simply re-characterized by the Minister in the reassessments. The Judge determined that he could not resolve this question of fact given the limited facts before him, and accordingly, could not answer the Rule 58 question.

[20] It is clear from both their written and oral submissions that the parties disagree as to the characterization of the transactions that formed the basis of the initial assessments and the Minister's reassessments. The Judge is owed a high degree of deference in the exercise of his discretion when considering a Rule 58 question. The Judge made no reviewable error in finding that he could not answer the Rule 58 question given the facts before him.

B. *Interpretation of Subsection 298(3) of the Excise Tax Act*

[21] As concerns the second issue, that being whether the Judge erred in law in his interpretation of the Minister's reassessing powers when considering an objection under the *Excise Tax Act*, the Judge made no order to this effect. Rather, the Judge undertook an analysis of subsection 298(3) of the *Excise Tax Act* and concluded that, although the wording is different than the wording of subsection 165(5) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) Parliament's intention is the same in both cases; that is, that the Minister cannot, after the expiry of the assessment period, increase the net tax of the registrant or take into account different transactions that the ones that formed the basis of the assessment that was made within the statutory reassessment period.

[22] I note that the respondent's cross-appeal, in reality, is directed against the Judge's reasons for declining to answer the Rule 58 question. It is fundamental that a cross-appeal lies against judgments and orders, not reasons (*Teva Canada Limited v. Canada (Health)*, 2012 FCA 106, [2013] 4 F.C.R. 391, at paragraph 46).

[23] I find that it is more appropriate to leave the interpretation of the Minister's reassessing powers in response to an objection under the *Excise Tax Act* to the trial judge in the circumstances of this case. The trial judge is better placed to examine the facts and the applicable law *de novo*, with the benefit of all of the relevant evidence the parties are able to muster. The trial judge will also be in a position to consider and address the consequences of any inability the parties may encounter in bringing forward additional evidence.

[24] For these reasons, I would dismiss the appeal and cross-appeal, without costs.

"Marianne Rivoalen"

J.A.

"I agree.
David Stratas J.A."

"I agree.
J.B. Laskin J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-68-18 |
| **STYLE OF CAUSE:** | VITERRA INC. v. HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MARCH 20, 2019 |
| **REASONS FOR JUDGMENT BY:** | RIVOALEN J.A. |
| **CONCURRED IN BY:** | STRATAS J.A.<br>LASKIN J.A. |
| **DATED:** | MARCH 25, 2019 |

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