Federal Court of Appeal  Cour d'appel fédérale

Date: 20201109

Docket: A-208-19

Citation: 2020 FCA 194

[ENGLISH TRANSLATION]

CORAM: **PELLETIER J.A.**
BOIVIN J.A.
LOCKE J.A.

BETWEEN:

6075240 CANADA INC.

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Ottawa, Ontario, on September 22, 2020.

Judgment delivered at Ottawa, Ontario, on November 9, 2020.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: BOIVIN J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] The appellant, 6075240 Canada Inc., filed an appeal from the decision of the Federal Court (2019 FC 642) that dismissed its application for judicial review of the Minister of National Revenue's (the Minister) decision not to make reassessments for the 2010 and 2012 taxation years on the grounds that the income tax returns for these years were filed after the normal

assessment period. Because the appellant did not file its income tax returns when required under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (the Act), the Minister made "estimated" assessments for the 2010 and 2012 taxation years. The appellant sent the Minister its income tax returns for the 2010 and 2012 taxation years more than three years after the date on which the notice of "estimated" assessment was sent. The Minister then informed the appellant that subsection 152(4) of the Act does not allow him to make reassessments after the normal assessment period. The same held true for 2012. Dissatisfied with the Minister's decision, the appellant applied for judicial review of these decisions in the Federal Court.

[2] The Federal Court interpreted the relevant provisions of the Act and dismissed the appellant's application on the ground that the Minister's decision was reasonable.

[3] According to the appellant, the Minister did not conduct an analysis that considered the text, the context and the purpose of the Act. The appellant also argued that the Federal Court's interpretation of the Act failed to give meaning to all the relevant provisions.

[4] For the above reasons, I would dismiss the appeal with costs.

II. The facts and the decision under appeal

[5] The appellant is a corporation whose fiscal year ends on December 31. It is therefore required to file its income tax return by June 30 of the following year. However, it did not file its income tax returns for the 2010 and 2012 taxation years until September 2, 2015, and March 8,

2018. Meanwhile, the Minister had issued “estimated” assessments for the 2010 and 2012 taxation years, on April 10, 2012, and May 28, 2014.

[6] These assessments were made pursuant to subsection 152(7) of the Act, which reads as follows:

152(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.	152(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.

[7] When the appellant attempted to file its 2010 income tax return, an officer of the Canada Revenue Agency (the Agency)—a delegate of the Minister—informed the appellant that under subsection 152(4) of the Act, the Minister could not make a reassessment after the normal assessment period. When the appellant filed its 2012 income tax return in 2018, its application for reassessment was again denied, on the same ground.

[8] The appellant applied for judicial review of these two decisions. The Federal Court dismissed this application on the ground that the Minister’s decision was reasonable according to the standard of review that applies in the circumstances. Since the decision was rendered before the Supreme Court decided *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019

SCC 65, [2019] S.C.J. No. 65 [*Vavilov*], the Federal Court did not discuss the Minister's decision in the light of the most recent principles laid down by the Supreme Court.

[9] The appellant attempted to persuade the Federal Court that the normal assessment period does not begin until the taxpayer files its income tax return. This argument is based on the language of subsection 152(4) which reads as follows:

152(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… (emphasis added)	152(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 : […] (je souligne)

[10] Leaving aside certain parts of subsection 152(4), the appellant argued that it should be interpreted as follows:

> The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year . . . under this Part . . . [to] any person by whom a return of income for a taxation year has been filed that no tax is payable for the year.

[11] According to the appellant, it follows that, in view of the mere fact that it has filed an income tax return, the Minister may make a reassessment. Furthermore, the Minister's duty to examine a taxpayer's return of income for a taxation year with all due dispatch and assess the tax payable, under subsection 152(1) of the Act, cannot be deprived of its force by an "estimated" assessment.

[12] The Federal Court rejected the arguments submitted by the appellant. The Court considers that the purpose of the assessments is to achieve the objective of the relevant provisions of the Act. This casts doubt on an interpretation of these provisions to the effect that "a significant category of assessments not to be subject to any time limit with respect to the making of a reassessment." (Reasons at para. 10). The Court noted that the Act does not create different categories of assessments. As a result, an "estimated" assessment, provided for in subsection 152(7) of the Act, is an assessment like any other.

[13] The Court added that the duty to examine an income tax return with all due dispatch and determine the tax payable must be interpreted in the light of the other provisions dealing with assessment and reassessment. When this provision is read in context, it must be concluded that the duty to examine with all due dispatch "does not apply where subsection 152(4) prohibits reassessment." (Reasons, at para. 11).

[14] The Court also rejected the argument submitted by the appellant regarding the interpretation of subsection 152(4). It compared the French and English versions of the Act and

stated that the part of the sentence on which the appellant's argument is based was not ambiguous, as the appellant claimed. The English version at issue reads as follows:

> . . . 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, . . .

[15] The Federal Court therefore held that the part of the sentence on which the appellant's argument was based—à toute personne qui a produit une déclaration de revenu pour une année d'imposition—did not have the scope that the appellant wished to give it. Rather, the Court determined that that part of the sentence applies only to the person who "notif[ies] 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" (Reasons, at para. 13).

[16] The appellant also invited the Federal Court to interpret the Act in conformity with the meaning of the Quebec *Taxation Act*, CQLR chapter I-3, which provided that the reassessment period may begin to run as of the time the taxpayer files an income tax return, even if it is filed after the normal assessment period. The Federal Court did not accept that invitation, since that federal and provincial legislators have enacted different rules.

[17] Ultimately, the Federal Court was not persuaded that the interpretation of the Act submitted by the Minister's delegate was unreasonable and dismissed the appellant's application.

III. Issues

[18] The appellant alleges that the Minister's delegate based his decision not to examine its income tax returns on an interpretation of the Act that is neither reasonable nor correct. It follows that the only issue herein pertains to the interpretation of the relevant provisions of the Act.

IV. Analysis

A. *Standard of review*

[19] In this case, the role of this Court is to decide whether the Federal Court chose the correct standard of review and whether it applied it correctly to the facts of the case. This amounts to saying that by "'step[ping] into the shoes' of the lower court" . . . the "appellate court's focus is, in effect, on the administrative decision" (*Agraira v. Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36, [2013] 2 SCR 559 at para. 46).

[20] The Supreme Court decided *Vavilov* after the Federal Court had rendered its decision; therefore, it is important to highlight the elements of *Vavilov* that apply in the circumstances of this case.

[21] In *Vavilov*, the Supreme Court held that there was a presumption that the applicable standard of review for all aspects of the decision at issue was reasonableness (*Vavilov*, at para. 25). The Supreme Court then turned to the characteristics of reasonableness.

[22] At paragraph 84 of its reasons, the Supreme Court stated that a "reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion." However, at paragraph 91, the Supreme Court hastened to point out that these reasons "must not be assessed against a standard of perfection." At paragraph 92, the Supreme Court noted the importance of not requiring the administrative decision-maker to use the language that a judge would:

> . . . Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision—indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

[23] That being said, the Supreme Court, at paragraph 100, did not set aside the characteristics of reasonableness, as stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190:

> . . . Before a decision can be set aside on this basis [unreasonableness], the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency.

[24] The Supreme Court went on to say:

> > We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it.

(*Vavilov*, at para. 101).

[25] It is therefore incumbent on this Court to review the decision of the Minister's delegate in the light of these principles.

B. *Interpretation of the Act*

[26] Since we must review the administrative decision, it is important to reproduce its relevant portions:

> According to subsection 152(4) of the *Income Tax Act*, we can make a reassessment for a [taxation] year if we receive the request for reassessment within three years of the end of the reassessment period. This period begins on the date of the original "Notice of Assessment" or the notice indicating that no tax is payable for a taxation year and ends three years after that date for a Canadian-controlled private corporation and four years after this date for all other companies. Because we assessed your return for the year December 31, 2010, on April 10, 2012, and we received your adjustment request on September 15, 2015, we cannot follow up on it
>
> (Appeal Book, page 173).

[27] Since the appellant did not file a return for the 2010 taxation year prior to September 15, 2015, the words "the assessment of your return for the year December 31, 2010, [made] on April 10, 2012" lend themselves to confusion. The meaning of these words were clear in a letter from the Agency regarding the 2009 taxation year. It explained that the assessments made under subsection 152(7) of the Act were considered returns received by the Agency (Appeal Book, page 171).

[28] In the same letter, the Agency stated that it refused to process the 2009 income tax return because the return was not received "within three years of the issuance of this assessment 152(7) [sic]." Although concise, this explanation was the same as the one that the Agency provided regarding the return filed for 2012.

[29] The fact that the Agency considered an assessment under subsection 152(7) to be a return did not explain its refusal to process a return filed after the normal assessment period. The basis for this refusal, in the two letters on the record, was that the return was filed late, after the normal assessment period, more than three years after the notice of original assessment was sent: see paragraph 152(3.1)(*b*) of the Act.

[30] The Agency's reasoning was therefore based on its interpretation of the relevant provisions of the Act. The appellant challenges the Agency's interpretation and submitted its own interpretation of the provisions at issue. It remains to be seen whether the appellant can show that the Agency's interpretation was unreasonable.

[31] The appellant insists that the Act does not define a limitation period for filing an income tax return, as long as the initial return has not been filed. Indeed, the appellant argues that although the Act provides that the appellant must file its income tax return by June 30 of each year (see paragraph 150(1)(*a*) of the Act), no provisions of the Act preclude the corporation from filing its return after this date. This argument will be examined below.

[32] The appellant continued its reasoning, noting that subsection 152(1) provides that 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 . . ." According to the appellant, pursuant to this provision, the Minister must examine the return of income for a taxation year, even if it was filed after the "estimated" assessment was made. It is clear that the Agency never said otherwise. The Agency submitted that it could not process a return filed after the normal assessment period. However, it does examine returns that it receives during this period.

[33] In paragraph 29 of its factum, the appellant completes its reasoning by stating that a taxpayer "must have filed its income tax return for the three-year period to begin." However, subsection 152(3.1) is unequivocal on this point:

152(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	152(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*) if at the end of the year the taxpayer is a mutual fund trust or a corporation 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	*a*) quatre ans suivant soit la date d'envoi d'un avis de première cotisation en vertu 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*) 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.	*b*) trois ans suivant celle de ces dates qui est antérieure à l'autre, dans les autres cas.

[34] Because the appellant is not a mutual fund trust and is a Canadian-controlled corporation that never received an original notification that no tax was payable by the corporation for the year, it is subject to paragraph (b). Consequently, this means that the normal assessment period begins to run as of the day of sending of a notice of an original assessment for the year.

[35] The appellant's central argument rests on subsection 152(4) of the Act, which is hardly surprising because this is the provision upon which the Minister's position is based. First, the appellant submits that pursuant to subsection 152(4), the Minister may reassess "any person by whom a return of income for a taxation year has been filed." However, as the Federal Court noted, the meaning of the English version of subsection 152(4) is not the same as the meaning that the appellant attributes to the French version.

[36] While the French version may be ambiguous, the English version is not. A comparison of both versions shows that the reference to filing a return is with respect to taxpayers who have filed a return in which they claim that no tax is payable. It has nothing to do with making an assessment or reassessment. The preposition "à" [in the French version] refers to "notify" rather

than “may at any time make an assessment.” Ultimately, the appellant failed to persuade me that its interpretation of subsection 152(4) is sound.

[37] The appellant also sought to avoid the application of subsection 152(4) by raising the definition of the normal assessment period. We have noted above that the appellant attempted to define starting point of the normal assessment period. This attempt ignores the wording of subsection 152(3.1). The Act clearly provides that the starting point is the day of the sending of the notice of original assessment and not the filing date of the return.

[38] Nevertheless, the appellant insists and argues that an “estimated” assessment is not an assessment for the purposes of subsection 152(3.1). Subsection 152(7), which provides that an assessment may be made if no income tax return has been filed, is reproduced at paragraph 6 above, but it is appropriate to refer to it, for convenience:

152(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.	152(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.

[39] First, I would note that subsection 152(7) is not a provision that authorizes assessment. This provision is procedural because it provides that the Minister is not bound by a taxpayer’s return, a necessary clarification in order to avoid the quandary that would result if the information provided by the taxpayer were binding on the Minister. Similarly, the power to

assess regardless of whether a return has been filed prevents unwilling taxpayers from avoiding assessments by not filing a return.

[40] In other words, an assessment permitted under subsection 152(7) is an assessment like any other assessment or reassessment. Subsection 152(8), according to which an assessment is deemed to be valid, applies both to assessments provided for in subsection 152(7) and those authorized by subsection 152(4).

[41] As a result, the appellant's argument that an assessment under subsection 152(7) is not an assessment for the purposes of subsection 152(3.1) must also be rejected.

[42] Let us now return to subsection 152(1), which provides that the Minister shall, with all due dispatch, examine a taxpayer's return of income for a taxation year, assess the tax for the year, and the interest and penalties. The appellant is of the view that this provision ensures that, notwithstanding any action that the Minister is authorized to take if a taxpayer has not filed a return, the Minister is required to assess the tax payable as soon as this taxpayer files a return.

[43] This argument fails to take into account subsection 152(8) which provides that any assessment shall be deemed to be valid. Consequently, while the Minister has the right to reassess a taxpayer, the examination of a taxpayer's late return has one purpose, to assess the tax payable by the taxpayer. Late filing does not vacate an "estimated" assessment and does not require the Minister to make a higher or lower reassessment. However, the Minister must examine the return. The only way to vacate an assessment, regardless of whether it is

"estimated" or not, is by way of notice of objection and appeal to the courts, in compliance with the time limits provided for in the Act, which include extensions and deadlines, if applicable.

[44] However, when the normal assessment period has elapsed, the taxpayer can no longer be reassessed. The "estimated" assessment, which is deemed valid under subsection 152(8), cannot be set aside by the simple filing of a return after the normal assessment period.

[45] A contextual interpretation of subsection 152(1) leads to the conclusion that 152(1) cannot impose an obligation upon the Minister that cannot be applied, i.e., the obligation to examine a return where the right to vary the amount of tax payable for the taxation year at issue is time-barred. That being said, the taxpayer is not exempt from filing a return. Section 238 is applicable until the expiry of the limitation period provided for in subsection 244(4) of the Act.

[46] For these reasons, the appellant has failed to show that the Minister's decision not to process the returns filed by the appellant was unreasonable. Although the decision is succinct, we should bear in mind that this decision-maker operates in a highly technical field where Parliament strives to be as precise as possible. As the Supreme Court pointed out in *Vavilov* (at paragraph 92), the Minister's delegate cannot be expected to perform an analysis that might be expected of an experienced legal expert. The decision rendered by this decision-maker allowed the appellant to challenge it in full knowledge of the facts.

Conclusion

[47] For these reasons, I would dismiss the appeal with costs.

" J.D. Denis Pelletier "
J.A."

"I agree.
Richard Boivin J.A."

"I agree.
George R. Locke J.A."

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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APPEARANCES:

Chantal Donaldson	FOR THE APPELLANT
Dominik Longchamps Charles Camirand	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Noël et Associés Gatineau, Quebec	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT