

CANADA / JUDGMENT

Gerlings v. Canada (Attorney General)

2024 FC 1892

COURT

Federal Court

DECIDED

25 November 2024

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Court (s) Database

Federal Court Decisions

Date

2024-11-25

Neutral citation

2024 FC 1892

File numbers

T-1776-22

Decision Content

Date: 20241125

Docket: T-1776-22

Citation: 2024 FC 1892

Ottawa, Ontario, November 25, 2024

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

ADAM GERLINGS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview [1] The Minister of National Revenue [Minister], acting through the Canada Revenue Agency [CRA], issued a Goods and Services/Harmonized Sales Tax [GST/HST] Business Number to the Applicant, Mr. Adam Gerlings, for the purpose of processing and assessing his GST/HST liability under the Excise Tax Act, RSC 1985, c E-15 [ETA]. Following an audit, on December 10, 2021, the CRA issued a Notice of (Re)Assessment to the Applicant.

[2] The Applicant seeks judicial review of the Minister's purported decision to register him and proceed with an audit pursuant to subsections 123(1), 241(1) and 241(1.3) of the ETA, on the basis that the Minister failed to obtain his consent and provide notice of her intent, thus failing to grant him any opportunity to participate and challenge the CRA's audit and assessment process.

[3] For the reasons that follow, the application for judicial review is dismissed. The evidence demonstrates that the Applicant was not registered under the ETA by the Minister. The account and business numbers were identification numbers assigned to the Applicant to administratively process and assess his GST/HST liability, and not for "registration" as understood under the ETA. Moreover, while the facts of this case may demonstrate that the Respondent failed to properly notify and allow the Applicant to participate and respond to the audit process leading to the assessment, the recent decision of the Supreme Court of Canada [SCC] in *Iris Technologies Inc v Canada*, 2024 SCC 24 [Iris] is dispositive. The Tax Court of Canada [TCC] has jurisdiction to determine issues of procedural fairness in relation to ETA audits and assessments. Even if this Court has residual jurisdiction to consider issues of procedural fairness in some circumstances, the allegations in this case do not meet the applicable criteria. Moreover, this Court has no jurisdiction to vacate the existing Notice of (Re)Assessment, which is under the exclusive jurisdiction of the TCC. In the circumstances, the TCC constitutes an adequate forum to cure any procedural or evidentiary defect, if any, in the Respondent's Notice of (Re)Assessment.

II. Background Facts [4] In 2012, Mr. Gerlings' parents purchased a house in Etobicoke under the Applicant's name, intending that he or his siblings live there if they decided to complete their education in Toronto. Mr. Gerlings was at the relevant times about 22 years of age.

[5] That intention never materialized. Instead, major renovations were made to the house and the parents decided to relocate there.

[6] In October 2013, the ownership of the house was transferred from the Applicant to his mother. Shortly thereafter, the parents moved out of the house and moved back to King City, where they lived the previous 15 years.

[7] In August 2014, the parents sold the house.

- [8] In February 2022, the CRA audited the Applicant's parents and withdrew proposed adjustments for the sale of the house made in 2014.
- [9] On or about December 10, 2021, the Applicant received a letter from the CRA stating that it had completed an audit for a real estate transaction for the audit period of October 1, 2013, to October 31, 2013, in relation to the transfer of the house from the Applicant to his mother [the December 10, 2021 letter].
- [10] December 10, 2021, was the first time that the Applicant ever received correspondence from the CRA as to any audit in relation to the house.
- [11] The letter contained the "Account Number" 74499 8139 RT001 and stated that the "account number [...] has been set up for this Real Property transaction. You will not be required to file any returns for this RT account." The letter also specifically states that "If you are not a GST/HST registrant with a business activity involving real property transactions, and you are involved in one real property transaction, you have to report the tax you are considered to have collected on form GST 62, Goods and Services Tax/Harmonized Sales Tax (GST/HST) Return (non-personalized)."
- [12] Mr. Gerlings did not receive any notice that he was going to be audited, did not know that any audit was ongoing until he received the December 10, 2021, letter, and never participated in any GST/HST audit.
- [13] Mr. Gerlings was deemed, by the CRA, to be a builder of a house and considered to have made a taxable self-supply on the date of transfer to his mother. The CRA claimed that the property was not used primarily as a place of residence by either Mr. Gerlings or a member of his immediate family, even though at all material times the house was intended to be the place of residence for either Mr. Gerlings or a member of his immediate family, and was his parents' place of residence for about one year.
- [14] During the course of these proceedings, the Applicant found out that the CRA had sent him several letters, but at an address where he was no longer residing. Mr. Gerlings learned that:

The CRA addressed an initial audit proposal letter dated August 15, 2019, to Mr. Gerlings at 195 Senlac Road, North York, Ontario M2R 1P3. No one from the CRA had attempted to contact him prior to that date.

The CRA tried to reach the Applicant by phone on September 18 and 25, 2019.

A subsequent letter was sent to Mr. Gerlings on January 16, 2020, at the same address, 195 Senlac Road, North York, Ontario M2R 1P3.

The letter dated December 10, 2021, that the Applicant eventually received, was addressed and sent at 609-105 Harrison Garden Boulevard, North York, Ontario M2N 0C3.

A Notice of (Re)Assessment was addressed to Mr. Gerlings on the same date, December 10, 2021. The Notice of (Re)Assessment was, however, sent to 195 Senlac Road, North York, Ontario M2R 1P3, the same address used for the other letters.

[15] Most importantly, the Applicant had never received the actual Notice of (Re)Assessment, which was mailed to an address that Mr. Gerlings had not occupied since 2018. The CRA ought to have been aware of Mr. Gerlings' new address as it was identified each year in Mr. Gerlings' income tax returns.

[16] There were no subsequent attempts made by the CRA to reach Mr. Gerlings by telephone.

[17] The Applicant only obtained the Notice of (Re)Assessment when it was attached as exhibit D of the Respondent's affiant, when it was served upon the Applicant on or about November 21, 2022, in the context of this application for judicial review.

III. Issues [18] The Applicant proposes three issues:

Whether the Minister failed to exercise or improperly exercised their discretion by registering the Applicant without providing him any notice of intent to register;

Whether the Minister rendered a final decision on the Applicant's registration under the ETA outside the range of reasonable outcomes on fact and law;

Whether the Minister breached their duty of procedural fairness or otherwise acted contrary to the ETA in their failure to notify the Applicant of the Minister's intent to register him under the ETA.

IV. Analysis A. Mr. Gerlings was not registered by the Minister pursuant to s. 241 of the ETA.

[19] Mr. Gerlings seeks judicial review of the Minister's decision to "register" him pursuant to s. 241 of the ETA. In his view, the inclusion of a GST/HST "Account Number" on the letter received on December 10, 2021, is indicative that he was registered by the Minister under the ETA, without his consent nor any possibility to oppose the registration or respond to any audit. Mr. Gerlings also argues that he never engaged in any commercial activity requiring him to register under the ETA.

[20] Mr. Gerlings appears to rely on the argument that, because he was erroneously registered under s. 241 of the ETA, the Notice of (Re)Assessment sent on December 10, 2021, must also be invalid. However, the Notice of (Re)Assessment is independent from the issue of registration under the ETA.

[21] As explained by the Respondent's affiant, which I accept, the CRA issued a "Business Number" to the Applicant in order to assess him for unremitted GST/HST on the sale of the house. That action, on its own, did not "register" the Applicant under the ETA, nor does it mean that the Applicant was required to register under s. 240 of the ETA. Indeed, the Minister determined that the Applicant did not need to be registered because his supply of real estate was not in the course of business.

- [22] Moreover, the December 10, 2021 letter received by the Applicant is clear that no registration was made: the Account Number was created only for the impugned transaction and the Applicant is under no obligation to file any GST/HST returns. I therefore find that Mr. Gerlings was not registered under s. 241 of the ETA.
- [23] This being said, one can understand the confusion in this case, which is not of the Applicant's doing. Mr. Gerlings filed his Notice of Application for Judicial Review upon receipt of a letter from the CRA notifying him of the result of an audit (the December 10, 2021 letter). Because the Notice of (Re)Assessment issued the same day was not known to him, having been sent to a wrong address, the Applicant's understanding was that the Minister exercised her discretion to register him under the ETA. The recourse sought was therefore not against the Notice of (Re)Assessment, but against the Minister's conduct to allegedly register him under the ETA.
- [24] However, on or about November 21, 2022, the circumstances changed. When the Respondent filed its affidavit in response to the Applicant's affidavit, the Respondent included the Notice of (Re)Assessment as exhibit D of the affidavit. For the first time, the Applicant was made aware of a Notice of (Re)Assessment.
- [25] Nevertheless, the Notice of Application for Judicial Review has not been amended, and still seeks a remedy against the Minister's decision to register the Applicant under the ETA. As I conclude that the Applicant was not registered under the ETA, the application must be dismissed.

B. The TCC has jurisdiction to adjudicate the Applicant's claim of breach of procedural fairness

- [26] At the hearing, the Applicant's counsel argued that regardless of whether the Minister had registered the Applicant under s. 241 of the ETA, the essence of the judicial review is that CRA's conduct at an operational level was egregious and reprehensible. In his view, the CRA sent all letters that are relevant to the Applicant's case to the wrong address, except for one. Worse, on December 10, 2021, the CRA sent two letters to the Applicant, to two different addresses. Moreover, the CRA was not able to adduce any evidence of any attempts to reach the Applicant by telephone or otherwise thereafter. The Applicant therefore seeks a declaration from the Court that the CRA's conduct is reprehensible in order to compel the CRA to amend its internal operational procedures, to ensure that the CRA properly amends taxpayers' mailing addresses so that the CRA's letters reach their intended final destinations.
- [27] I decline to issue the declaration. The Notice of Application did not request any declaratory relief in relation to the Minister's conduct, and was not amended. But even if declaratory relief had been sought, the CRA's conduct in this case was not in bad faith or so egregious as to require this Court to intervene. There is no evidence that the issue that arose in this case is systemic.

- [28] It is also important to note at the outset that the parties are in agreement that this Court does not have jurisdiction to vacate the Notice of (Re)Assessment. However, the Applicant asserts that he is not attacking the Notice of (Re)Assessment and that this Court has jurisdiction to rule on the Minister's conduct.
- [29] In *Iris*, the SCC held that the Federal Court's jurisdiction is limited and that if the essence of the application is an attack on an assessment, then the TCC has exclusive jurisdiction to rule on the matter (at paras 28, 33). The SCC continued, ruling that when the claim on judicial review is grounded in procedural fairness, as in the Minister failing to provide the taxpayer with an opportunity to respond, an applicant would have the opportunity to provide their arguments and respond in the context of an appeal of the assessment to the TCC. Simply put, an appeal to the TCC is an "adequate, curative remedy" (at para 37).
- [30] In this case, and similar to *Iris*, relief is sought on the basis of a breach of procedural fairness, because the CRA never sent appropriate notices to the Applicant's actual mailing address, thereby denying him of an opportunity to respond to the Minister's proposed assessment.
- [31] Therefore, even if there was a breach of procedural fairness because the Applicant was never given the opportunity to respond to the CRA's concerns, the Applicant has a recourse with an appeal of the assessment before the TCC. As held by the SCC in *Iris*, taxpayers alleging procedural unfairness and a lack of evidentiary foundation for an assessment, such as the arguments made by the Applicant and the evidence put forward in his affidavit, are properly within the exclusive jurisdiction of the TCC (at para 10). The TCC, conducting a *de novo* review of the assessment, will be able to rule on the evidence and vacate the assessment if there is not sufficient evidence to support it. The Applicant's argument that he was never able to respond to the Minister's questions regarding the assessment will be cured in the context of an appeal to the TCC, which is an "adequate, curative remedy" (at paras 37–38, 64, 90). In that sense, as held by the SCC, complaints about the assessment are addressed by an appeal to the TCC (at para 50).
- [32] However, in *Iris*, the SCC also ruled that the Federal Court has a residual jurisdiction in relation to allegations of improper purposes, distinguishing between the correctness of the assessment, which is of exclusive jurisdiction of the TCC, and the process by which the assessment is established (at paras 39–40). At paragraphs 41–42, the SCC held:
- [41] It is true that an allegation of improper purpose can, in some circumstances, sustain an application for judicial review in tax matters. By way of example, as Stratas J.A. wrote in *JP Morgan*, the Tax Court does not have jurisdiction to set aside an assessment "on the basis of reprehensible conduct by the Minister leading up to the assessment, such as abuse of power or unfairness" (at para. 83). Instead, jurisdiction to provide relief from reprehensible conduct of the Minister would fall to the Federal Court exercising its exclusive jurisdiction in judicial review under s. 18.1 of the FCA.

- [42] However, I agree with Rennie J.A. that this allegation of improper purpose should nevertheless be struck. Iris has failed to allege facts in its application that, if true, could support its allegation that the Minister acted here with an improper purpose. As Rennie J.A. noted, “Iris has not pointed to any particular motive or conduct of the Minister other than to say that the Minister issued the assessments to deprive the Federal Court of jurisdiction in the related Federal Court proceeding” (at para. 14).
- [33] Thus, the Applicant argues that the Court has jurisdiction to grant a declaration noting the CRA’s errors in the process leading to the assessment, because of the CRA’s egregious conduct that, in his view, rises to the level of “reprehensible conduct.”
- [34] In my view, while Iris has confirmed this Court’s residual jurisdiction relating to the Minister’s “reprehensible conduct” or “improper purpose,” “abuse of power or unfairness,” the CRA’s conduct in this case does not rise to that level. While the CRA did send letters to a wrong mailing address (the CRA did call the Applicant and left messages on his voicemail at some time prior to issuing the Notice or (Re)Assessment), the CRA’s conduct was not in bad faith nor intentional.
- [35] Moreover, as stated, the Notice of Application was not amended, did not request declaratory relief against the Minister’s or the CRA’s conduct, and the Applicant failed to allege sufficient facts to that effect in his Notice of Application for Judicial Review. Because the Notice of Application did not specifically seek declaratory relief nor allege sufficient facts to establish a “reprehensible conduct,” the Respondent did not attempt to disprove those allegations in its responding affidavit. Issuing declaratory relief in the circumstances of this case, because of the manner in which the application was framed, is not justified.
- [36] Finally, issuing declaratory relief in this case would not be of any use. As held by the SCC in *Iris*, “the Minister’s assessment of net tax pursuant to the ETA is not the exercise of a discretionary power” (at para 47) and the outcome is dictated by statute (at paras 47–49). The SCC continued and affirmed that “[t]here is no use in trying to separate the ‘motivation behind a decision to assess from the correctness of the assessment itself. It is a meaningless exercise, since the assessments themselves are not discretionary’” (at para 52, citing *Canada (Attorney General) v Iris Technologies Inc*, 2022 FCA 101 at para 17).
- [37] Thus, in circumstances where it is the Minister’s conduct that is impugned, but the assessment itself is non-discretionary and relies on the operation and application of the statute, any declaration on the Minister’s conduct “will have no practical effect” and should not be issued (at para 55).

- [38] The Applicant asserts that a declaration in this case would have practical effect because it will force the CRA to adopt better procedures in notifying taxpayers. With respect, there is no evidence that the situation in this case is systemic, and that the CRA must adopt new operational measures to remedy a systemic issue. A declaration would therefore have no practical utility because it would “not quash or vacate the assessments [and] would serve little or no purpose” (see *Iris* at paras 58, 110).
- [39] In the end, the allegation that the Minister breached procedural fairness in the assessment process, by failing to notify the Applicant and allow him to respond to the audit, does not mean that judicial review is available to the Applicant. Rather, that issue may be addressed by the TCC in an appeal of the assessment (*Iris* at paras 36–37, 84, 95, 99). While the CRA has clearly made a mistake in sending letters to a wrong address, that conduct on its own does not rise to the level of a “reprehensible conduct,” “improper purpose,” “abuse of power or unfairness” that would justify a declaration in this case.
- V. Conclusion [40] The application for judicial review must be dismissed. The Applicant has not been registered by the Minister under s. 241 of the ETA, and has not requested any declaratory relief in his Notice of Application relating to the Minister’s or CRA’s conduct.
- [41] In the circumstances, I will exercise my discretion not to grant any costs against the Applicant. The CRA clearly is responsible for the ambiguity in this case, having failed to mail the letters to the Applicant’s current mailing address, even if the CRA had been notified of the Applicant’s new mailing addresses in his annual tax returns. The CRA’s error created some ambiguity for the Applicant, which was not clarified until the Notice of Application for Judicial Review was filed and the Notice of (Re)Assessment subsequently included as an exhibit to an affidavit in response. For these reasons, costs ought not to be granted against the Applicant.

JUDGMENT in T-1776-22

THIS COURT’S JUDGMENT is that:

1)The application for judicial review is dismissed, without costs.

“Guy Régimbald”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-1776-22

STYLE OF CAUSE:

ADAM GERLINGS v THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING:

TORONTO (ONTARIO)

DATE OF HEARING:

NOVEMBER 18, 2024

JUDGMENT AND REASONS:

RÉGIMBALD J.

DATED:

NOVEMBER 25, 2024

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Prepared on 25 October 2026 · Esheria