

Federal Court not Appropriate Venue to Challenge Decision to Assess

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Garbutt v Canada, [2016 FC 1292](#)

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The taxpayer, a tax lawyer, filed an application for Judicial Review to challenge the CRA decision to issue notices of assessment. The taxpayer attempted to draw a distinction between the reasonableness of issuing an assessment in the circumstances of a lawyer claiming privilege over certain documents requested by the CRA as part of an audit, and the outcome of the assessment being the tax liability.

The Minister brought a motion to strike, which the Federal Court granted (para 2), arguing that the Federal Court lacked jurisdiction and the matter was under the exclusive jurisdiction of the Tax Court of Canada. This again confirms that where a taxpayer is at its core seeking to challenge the existence or quantum of a tax liability, the proper forum is the Tax Court of Canada.

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ANALYSIS

The Court began by identifying the test for striking an application for judicial review - assuming the facts to be true, it is plain and obvious that the application cannot succeed or has no reasonable prospect of success (*R v Imperial Tobacco Canada Ltd*, [2011 SCC 42](#) at para 17).

The Minister argued that the application cannot succeed because the Tax Court has exclusive jurisdiction to grant the relief sought ([Federal Courts Act](#), s 18.5) and the Court cannot prevent the Minister from administering and enforcing the ITA (para 16). The taxpayer argued that this was not a collateral attack as the Tax Court does not have the jurisdiction to determine the reasonableness of the decision to issue an assessment.

The motivation behind the application is found in paragraph 18 and is evidentiary. The lawyer was concerned that, given the taxpayer's burden before the Tax Court of Canada, the fact that a

substantial portion of the documents are subject to privilege prevents him from mounting an adequate defence.

The Court agreed that there are appropriate times to seek judicial review in the tax context, being (i) where the decision is *ultra vires*, and (ii) the decision is substantively unacceptable - [Canada \(National Revenue\) v JP Morgan Asset Management \(Canada\) Inc, 2013 FCA 250](#).

The Taxpayer argued that the decision was *ultra vires* because the decision was based on his refusal to provide privileged documents in light of the decision in *Canada (National Revenue) v Thompson, 2016 SCC 21*, holding the ITA provisions in respect of privileged documents to be unconstitutional. The decision, he argued, was also substantively unacceptable because the quasi-constitutional nature of solicitor-client privilege narrows the range of acceptable outcomes - *Canada (Attorney General) v Abraham, 2012 FCA 266*.

The Court, however, stated that it must consider the "essential nature of the claim" (para 21). The Court held that, in this case, the distinction was artificial as assessments are part of the assessment process such that there is no discrete decision that can be subject of judicial review (*Bowater Mersey Paper Co v R, [1987] FCJ No 427, 87 DTC 5382 at para 10*).

The claim, in this case, was not an administrative law claim as the basis of the assessment is subsection 152(7) - allowing the Minister to assess whether or not a taxpayer has supplied or returned information - which is not unconstitutional (para 28). The Minister must issue an assessment in the face of tax liability, meaning that there is no discretion to abuse or challenge (para 29).

The legal validity of an assessment cannot be challenged on administrative grounds, but falls squarely within the exclusive jurisdiction of the Tax Court of Canada (paras 32-33). The Tax Court "provides a complete appeal procedure that allows taxpayer's to raise [...] all issues relating to the correctness of an assessment , i.e., whether the assessment in question is supported by the facts of the case and the applicable law" (para 33).

Additionally, both challenges to the admissibility of evidence and concerns about the inability to discharge the evidentiary burdens on the taxpayer are properly dealt by the Tax Court and not on judicial review to the Federal Court (para 34).

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