

Minister's Duty to Assess

The MNR's Duty to "Assess With All Due Dispatch" - What Does it Mean?

Ficek v Canada (AG), [2013 FC 502](#)

The issue was whether the MNR met the onus to examine a taxpayer's tax return "with all due dispatch" in circumstance where delay in examination was caused by a policy of a local tax centre of the CRA to discourage certain types of tax shelter donations?

The Court held that the assessment process must be reasonable and for a proper purpose, being the determination and fixation of a taxpayers liability under the ITA. No specific time period is required. However, even if a proper purpose may exist to justify a delay in issuing assessments, an improper purpose for the policy will taint and make unreasonable the delay.

DISCUSSION

The most significant part, though not from a precedential perspective, of this decision is the FC's statement that legitimacy or lack thereof of a tax scheme is not a matter for CRA to determine (and therefore for the CRA to fashion a self-remedy for), but a matter for the TCC. It appears that the CRA when faced with difficult tax avoidance and arbitrage schemes wants to take the easy and improper way out, though motivated by a good purpose, and act on its own rather than push for legislative change or make arguments in court. This decision, and the FC's reference to the 'real purpose' and the 'purified' policy document shows that government agencies are potentially acting with less than appropriate transparency and honesty, potentially making Canada no better than regimes internationally condemned (though Canada uses better window dressing). In a democracy, citizens ought to be able to look at government agencies and know that what the agency states it is doing, is in fact what it is doing. Publicly Pronounced Policy must be more than communication of the proper parts of government intention and action, it must be the real thing.

FACTS

This was a test case as 83 other similar cases exist in 2010 and more in 2011. There are between 27-28,000 notices of appeal filed with reference to GLGI for 2004-2006 tax years alone. The TCC has not yet issued a judgment as to the deductibility of these donations.

The facts revolve around the Global Learning Gift Initiative (GLGI), which is a registered tax shelter with CRA since 2004. The CRA audited GLGI and denied all charitable receipts of the tax years 2004-2008, and the CRA's view of GLGI's operations had not changed by 2010 (the tax year in question for the appeal).

The CRA's long standing national policy was to allow taxpayers' claims for charitable donations and, if necessary upon auditing the charity, issue a reassessment. However, when the taxpayer made a donation according to the charity scheme of GLGI in 2010 but was told by

the CRA that the assessment would not be issued until the 2010 audit of GLGI was complete.

ANALYSIS

The FC noted that the MNR has a wide, though not unfettered, discretion in assessing. The FC should only intervene if the discretion exercised is unreasonably [or presumably exercises in an unreasonable manner] or the action is not compliant with the ITA. The question the FC looked at was whether the MNR's failure to assess was based on irrelevant considerations or for an improper purpose.

The phrase "with all due dispatch" was canvassed by the Exchequer Court in *Jolicoeur v Minister of National Revenue*, [1960] CTC 346, 60 DTC 1254 (Ex Ct), with the conclusion that the phrase is equivalent to "with all due diligence" or "within a reasonable time". Thus, there is no fixed period for the performance of the duty to assess. The governing principles are described in the following manner:

47 There is no doubt that the Minister is bound by time limits when they are imposed by the statute, but, in my view, the words "with all due dispatch" are not to be interpreted as meaning a fixed period of time. The "with all due dispatch" time limit purports a discretion of the Minister to be exercised, for the good administration of the Act, with reason, justice and legal principles.

48 The subject-matter in this appeal being the assessments, what the Court has to consider is the correctness of the assessments in question. In *Provincial Paper Ltd. v. Minister of National Revenue*, [1954] C.T.C. 367, the President of this Court stated at page 373,

... There is no standard in the Act or elsewhere, either express or implied, fixing the essential requirements of an assessment. It is, therefore, idle to attempt to define what the Minister must do to make a proper assessment. It is exclusively for him to decide how he should, in any given case, ascertain and fix the liability of the taxpayer. The extent of the investigation that he should make, if any, is for him to decide. Of necessity it will not be the same in all cases.

49 There is no doubt that the Minister is required to reconsider the assessment upon receipt of a notice of dissatisfaction in the time best suited for the accomplishment of his duty; however, the determination in each case as to whether he has executed his duty "with all due dispatch" is a question of fact. He may be delayed in his determination by many reasons and factors. But as said above, it is exclusively for him to decide how he should, in any given case, ascertain and fix the liability of the taxpayer and the extent of his reconsideration. This being so, how can the courts interfere and decide that an assessment becomes null and void because notice of reconsideration was not served in the time limit of 180 days?

(Underlining by Court)

This discretion must both be reasonable and for a proper purpose of ascertaining and fixing the liability of the taxpayer: *J Stoller Construction Ltd v Minister of National Revenue*, [1989] 1 CTC 2171, 89 DTC 134 (TCC). The purpose of this provision is to bring certainty to the taxpayer's financial affairs at the earliest time possible.

Not issuing an assessment has significant consequences including: starting the 3 year limitation period for reassessments; ability to file notice of objection so as to proceed to the TCC, and inability to compel the refund of tax overpayments.

In order to determine whether the MNR met the duty imposed, the real purpose of the new policy had to be ascertained. The real aim was to deter taxpayers from participating in the GLGI program. The FC stated that the different treatment of taxpayers dealing with the Winnipeg office was inconsistent with the federal and national nature of the MNR's obligations.

The FC held that even if there was a legitimate purpose for waiting for the completion of the audit, this legitimate purpose was tainted by the real purpose of the new policy, such that the reason for the delay is not a reasonable one. The FC also noted that the legitimacy or lack thereof of the GLGI initiative is a matter for the TCC, not one for the CRA to determine. The MNR's obligation to assess is unaffected by local policy concerns.