Docket: 2006-1685(IT)I

BETWEEN:

CARL CURRIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard by Conference Call on February 9, 2012,
at Ottawa, Canada

Before: The Honourable Justice Wyman W. Webb

Participants:

Counsel for the Appellant:	David W. Hooley Robin Aiken
Counsel for the Respondent:	Cecil S. Woon

ORDER

The Appellant's motion for an order (as provided in subsection 22(2) of the *Tax Court of Canada Rules (Informal Procedure)*) requiring the Minister of National Revenue or the Canada Revenue Agency to appear before a judge of this court in relation to an allegation that such person is in contempt of court is dismissed with costs.

Signed at Ottawa, Canada, this 5th day of March 2012.

"Wyman W. Webb"

Webb J.

Citation: 2012TCC62
Date: 20120305
Docket: 2006-1685(IT)I

BETWEEN:

CARL CURRIE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Webb, J.

[1] The Appellant brought a motion under subsection 22(2) of the *Tax Court of Canada Rules (Informal Procedure)* (the "*Rules*") for an order requiring the Minister of National Revenue or the Canada Revenue Agency to appear before a judge of this Court to respond to an allegation by the Appellant that such person was in contempt of court in relation to a judgment that had been rendered by Justice Rossiter (as he then was) of this Court on June 13, 2008 (the "Judgment"). The Appellants had previously brought a motion for contempt but since the Appellant had not first obtained the required order for someone to appear, the matter was adjourned and this motion was heard by conference call with both parties filing affidavit evidence.

[2] In *Bhatnager* v. *Canada*, [1990] 2 S.C.R. 217, Justice Sopinka (who was writing on behalf of the Supreme Court of Canada), made the following general comments in relation to an allegation of contempt:

> 14 It is well to remember at the outset that an allegation of contempt of court is a matter of criminal (or at least quasi-criminal) dimension …

[3] Subsections 22(1) (in part), (2) and (4) of the *Rules* provide as follows:

> 22. (1) A person is guilty of contempt of court who
> …

> (*b*) wilfully disobeys a process or order of the Court;
>
> …
>
> (2) Subject to subsection (6), before a person may be found in contempt of court, the person alleged to be in contempt shall be served with an order, made on the motion of a person who has an interest in the proceeding or at the Court's own initiative, requiring the person alleged to be in contempt
>
> (*a*) to appear before a judge at a time and place stipulated in the order;
>
> (*b*) to be prepared to hear proof of the act with which the person is charged, which shall be described in the order with sufficient particularity to enable the person to know the nature of the case against the person; and
>
> (*c*) to be prepared to present any defence that the person may have.
>
> …
>
> (4) An order may be made under subsection (2) if the Court is satisfied that there is a *prima facie* case that contempt has been committed.

[4] Therefore there is a two step process in relation to an allegation of contempt of court. The first step (which is the subject of this Motion) is the issuance of an order requiring a particular person to appear before a judge in relation to the allegation of contempt. In order for such an order to be issued in this case I must be satisfied that there is a *prima facie* case that contempt has been committed. If this order is issued, the Appellant would then be required, at the hearing for contempt, to prove beyond a reasonable doubt[1] that the person who was required to appear committed the alleged contempt of court.

[5] The Judgment (which the Appellant alleges has not been given effect) provided as follows:

> The appeal from the assessment made under subsection 160(1) of the *Income Tax Act*, notice of which is dated February 3, 2004 and bears number 30527 is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the Appellant is not liable for interest on the Estate debt from December 31st of the year of the transfer, for and in accordance with the reasons set out in the attached Reasons for Judgment.

[1] *Bhatnager* v. *Canada*, *supra*, at paragraph 14.

[6] The Appellant's father (Delmar Currie) died in 1996 and the Appellant was one of the two executors of the Estate. A tax return was prepared for the year of death in which, *inter alia*, the capital gain arising on the deemed disposition of the shares that Delmar Currie held in a golf course company was reported. In 2000 the Estate of Delmar Currie was reassessed to increase the tax liability arising as a result of the deemed disposition of these shares and following the filing of a notice of objection, the Estate was again reassessed to reduce the tax liability of the Estate. It appears that the amount reassessed on April 26, 2002 (following the notice of objection) was $705,388.

[7] Prior to the first reassessment of the Estate the Appellant (and his siblings) received certain assets from the Estate of Delmar Currie. Section 160 of the *Income Tax Act* (the "*Act*") provides, in part, that:

> 160. (1) Where a person has … transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to
>
> …
>
> (*c*) a person with whom the person was not dealing at arm's length,
>
> the following rules apply:
>
> …
>
> (*e*) the transferee and transferor are jointly and severally liable to pay under this Act an amount equal to the lesser of
>
> (i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and
>
> (ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,
>
> but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.

[8] On February 3, 2004 the Appellant was assessed under section 160 of the *Act* in the amount of $544,147 (the "section 160 Assessment") which reflected certain payments that had been made on the tax debt of the Estate prior to that date. Although the fair market value of the assets that the Appellant received from the

Estate is not clear, the Appellant did not object to the section 160 Assessment on the basis that the fair market value of the assets that he received was less than the amount for which he was assessed. The basis for his objection and appeal was that the Appellant should not be liable for interest on the amount assessed under section 160 of the *Act* for any period after the date of the section 160 Assessment.

[9] The Judgment provided that the section 160 Assessment should not have included any interest for any period following the year in which property was transferred to the Appellant. Therefore as a result of the Judgment the amount for which the Appellant should have been assessed under section 160 of the *Act* should have been less than $544,147. It is the position of the Appellant that he should have received a refund and since he has not, that the Minister of National Revenue or the Canada Revenue Agency is in contempt of the Judgment.

[10] There are two general issues that will be addressed:

(a) Has the Appellant established a *prima facie* case that there has been a failure to comply with the Judgment; and

(b) If so, can the Minister of National Revenue or the Canada Revenue Agency be cited for contempt?

[11] In *Canadian Broadcasting Corp. (CBC)* v. *CKPG Television Ltd.*, [1992] 3 W.W.R. 279, 64 B.C.L.R. (2d) 96, Justice Lambert, writing on behalf of the British Columbia Court of Appeal, stated that:

> … In the context of an application where both parties have filed affidavit evidence, I presume that "a *prima facie* case" must mean a case where, if a decision were to be made as if the evidence on the application were all the evidence there was ever going to be, that decision would be in favour of the applicant….

[12] In this case both parties have filed affidavit evidence in relation to the previous motion that had been made with respect to the allegation of contempt and in relation to this motion. Therefore the issue for this Motion is whether I am satisfied that, based only on the affidavit evidence that was filed either in relation to the previous motion for contempt or the current motion, there is a *prima facie* case that contempt has been committed in relation to the Judgment.

[13] In this case the question is: how do we know if there has been a failure to comply with the Judgment? If the tax debt of the Estate would not have been paid

and the amount of the adjustment was certain, it would be obvious whether there has been a failure to comply with the Judgment as the amount that the Canada Revenue Agency should be seeking to recover from the Appellant pursuant to section 160 of the *Act* should be less than $544,147 after giving effect to the Judgment. However, in this case the tax debt of the Estate has been paid in full and was paid in full before the Judgment was rendered and therefore it is more difficult to determine if there has been a failure to comply with the Judgment.

[14] Counsel for the Respondent had argued that since a second assessment (for $0) had been issued under section 160 of the *Act* prior to the hearing of the appeal in 2008 (as a result of the tax debt of the Estate having been paid in full) that this second assessment nullified the section 160 Assessment and therefore there was no amount to adjust. The affect of the second assessment under section 160 of the *Act* was the subject of a motion that was heard by Justice Bowie on November 22, 2006. That motion was for an order to quash the appeal on the basis that, as a result of the second assessment for $0 under section 160 of the *Act*, there was no assessment under section 160 of the *Act* from which the Appellant could appeal. That motion was dismissed.

[15] The issue of the affect of the second assessment for $0 under section 160 of the *Act* appears to have again been raised in the hearing before Justice Rossiter (as he then was). In his Reasons provided with the Judgment, Justice Rossiter (as he then was) referred to the section 160 Assessment as Assessment #1 and the second assessment dated May 11, 2006 in the amount of $0 as Assessment #2. It is clear in paragraph 26 of the Reasons provided with the Judgment that Justice Rossiter (as he then was) was ordering a variation to Assessment #1 (the section 160 Assessment).

[16] Since the tax debt of the Estate of Delmar Currie was paid in full sometime before May 11, 2006 (and therefore before the Judgment), the Appellant could not have been assessed under section 160 of the *Act* after the date of the Judgment (June 13, 2008) for any amount in relation to the liability of the Estate of Delmar Currie under the *Act*. One of the limiting amounts in section 160 of the *Act* is the liability of the transferor under the *Act* (subparagraph 160(1)(*e*)(ii) of the *Act*) and since there was no liability of the Estate of Delmar Currie in 2008, no assessment could have been issued in 2008 under section 160 of the *Act* in relation to any debt of the Estate of Delmar Currie. It seems to me that the affect of the Judgment is that the assessment that had been issued under section 160 of the *Act* on February 3, 2004 (at a time when there was a liability of the Estate of Delmar Currie under the *Act*) should be varied. This assessment should have been varied by not including “interest on the Estate debt from December 31st of the year of the transfer”.

[17] The year of transfer was not specified in the Judgment. It appears that there is some uncertainty with respect to the determination of the year of the transfer of property to the Appellant. It is the position of the Appellant that the last year in which property was transferred to him was 1997. However, in his Notice of Appeal to this Court (which was signed by the Appellant) the Appellant stated that:

> 4) Between 1996 and 1999, various properties were transferred from the Estate of Delmar Currie to the Appellant as a result of the Appellant being a beneficiary under the late Delmar Currie's will.

[18] In her affidavit sworn January 30, 2012, Hélène Dahl, the litigation officer with the Canada Revenue Agency, stated that:

> 23. In July 2008, after reviewing the records, I was of the understanding that the Appellant received properties from the Estate up to and including the year 2000 as was indicated in the Reply.

[19] As a result it appears that there are three possible dates that should be used to determine the amount of the adjustment that is to be made to the section 160 Assessment – December 31, 1997, December 31, 1999 and December 31, 2000. Hélène Dahl had sworn an affidavit on November 2, 2011 in relation to the previous motion that the Appellant had made for a contempt order. In that affidavit, Hélène Dahl had included a table that indicated the amounts of the Estate debt and the amount that should have been included in the section 160 Assessment (which was dated February 3, 2004), "without taking into account the fact that the underlying Estate debt has been paid in full" based on the three possible years for the final transfer of property. This table included the following:

	Dec. 31, 2000	Dec. 31, 1999	Dec. 31, 1997
Total Estate Debt	$627,830	$569,506	$476,876
Less: Payments on Estate debt in 2002	$230,000	$230,000	$230,000
Total Section 160 debt	$397,830	$339,506	$246,876

[20] Obviously the determination of the year in which the property was transferred is necessary to determine the amount for which the Appellant should have been assessed under section 160 of the *Act* on February 3, 2004. As noted above, there is a disagreement between the Appellant and the Respondent with respect to the correct year for the transfer of property and therefore the correct adjustment that should have been made to the section 160 Assessment.

[21] Subsection 22(1) of the *Rules* provides that:

> 22**.** (1) A person is guilty of contempt of court who
>
> …
>
> (*b*) ***wilfully*** disobeys a process or order of the Court;
>
> (emphasis added)

[22] This would require *mens rea* of wilfulness[2]. Since an element of contempt of court as provided in the *Rules* is that the person who is alleged to have committed the contempt of court must have *wilfully* disobeyed a process or order of the Court, any uncertainties related to the application of the Judgment should have been resolved prior to and not as part of a contempt proceeding. How could a person have wilfully disobeyed the Judgment if the amount of the adjustment to be made to the section 160 Assessment is not clear? The correct year for the transfer and therefore the appropriate adjustment that should have been made to the section 160 assessment should have been resolved either by agreement between the parties or by a court of competent jurisdiction before the Appellant brought the motion for a contempt hearing.

[23] Once the year of transfer is determined and therefore the amount of the adjustment to the section 160 Assessment is determined, it will then be necessary to determine if the Appellant is entitled to a refund that is not being paid to him. Assuming that the year of the transfer of the property is 1997 (which would be the most beneficial for the Appellant), the amount for which the Appellant should have been assessed pursuant to section 160 of the *Act* is $246,876 (based on the table

---

[2] It should be noted that section 466 of the *Federal Courts Rules* provides that:

> 466**.** Subject to rule 467, a person is guilty of contempt of Court who
>
> …
>
> (*b*) disobeys a process or order of the Court;

Therefore it appears that *mens rea* would not have to be proven to establish contempt in relation to an order of the Federal Court (*Tele-Direct (Publications) Inc.* v. *Canadian Business Online Inc.*, 151 F.T.R. 271, [1998] F.C.J. No. 1306; *Merck & Co.* v. *Apotex Inc.*, 2003 FCA 234 (Leave to appeal to the Supreme Court of Canada dismissed ([2003] S.C.C.A. No. 366)).

prepared by Hélène Dahl). The question would then be whether the Appellant paid more than this amount pursuant to the section 160 Assessment.

[24] In the decision of Justice Rossiter (as he then was), he noted that:

> 9 The Appellant made payments on the Estate assessment:

July 21, 2004	$50,000.00
December 23, 2005	$173,000.00
February 6, 2006	$150,000.00
March 23, 2006	$247,289.64
Total	$620,289.64

[25] Counsel for the Appellant submitted that during the hearing before Justice Rossiter (as he then was) the Appellant was examined and cross-examined on whether he was making payments under the section 160 Assessment. However, the issue before Justice Rossiter (as he then was) was the validity of the section 160 Assessment, not whether the Appellant would be entitled to a refund. As noted above, in the Reasons for the Judgment the section 160 Assessment was referred to as "Assessment #1". While Justice Rossiter (as he then was) did note that "the Appellant made payments on the Estate assessment", he did not state that these payments of $620,290 were made pursuant to Assessment #1 (the section 160 Assessment). Therefore there was no clear finding that the Appellant made $620,290 in payments under the section 160 Assessment nor would that finding have been necessary to determine whether the Appellant should have been assessed under section 160 of the *Act* in the amount of $544,147 on February 3, 2004 (which was the issue that was determined).

[26] The uncertainty in this case in relation to the payments made by the Appellant arises as a result of a decision of the Supreme Court – Trial Division of the Province of Prince Edward Island dated December 12, 2005 (2005 PESCTD 64). The issue in that case was which assets of the Estate of Delmar Currie should be used to pay the debts of the Estate arising as a result of the reassessment of the Estate for income tax (which is the same reassessment under the *Act* which gave rise to the section 160 Assessment of the Appellant). Justice Taylor, in that case, held that:

> 39 The executors have transferred all the residuary assets to Carl Currie. I order him to immediately return these assets to the Estate, and failing compliance, I direct the executors to take action forthwith to recover the residuary assets or their value from Carl Currie. As to the land which he received, pursuant to s. 113(2) of the *Probate Act*, I direct the executors to sell forthwith at fair market value such lands as may be necessary to pay the Estate debts and expenses in full.

> 40 Certain of the assets in the residue will have deteriorated and lost their value or will have been consumed, specifically the household goods, machinery, tools, livestock, farm produce and vehicles. I can think of no way now to determine if the values placed on the assets in 1996 were fair. I presume Carl Currie took these assets and used them. I direct he return to the Estate the value which he and his brother assigned to these goods, namely $166,366.67, and these monies be used to pay debts.
>
> …
>
> Conclusion
>
> 52 I declare as follows:
>
> a) the $64,000 investment is part of the residue;
>
> b) the money in the two bank accounts designated as being part of the residue is an estate asset;
>
> c) the debts and expenses are payable first from the residue;
>
> d) Carl Currie holds the assets he received in trust and the executors must recover the residuary assets from him.
>
> 53 I order Carl Currie to immediately return the land he received from the residue and immediately repay to the Estate the value of the other residuary assets as declared in the inventory; failing compliance, I order the executors to forthwith take action to recover from Carl Currie the residuary assets or their value.
>
> 54 I further order the executors to forthwith sell such residuary lands as may be necessary to pay all the estate debts and expenses in full.

[27] Since the Appellant was ordered to return to the Estate the assets that he had received as part of the residue of the Estate and further that such assets were being held in trust by him (to pay the tax liability of the Estate), it seems to me that there is an issue with respect to whether any payments that were made by the Appellant after December 12, 2005 were, to the extent that such payments were less than the amount he was holding in trust and required to repay to the Estate, paid from the assets he was holding in trust and not from his personal assets or were paid from his personal assets. It seems to me that the Appellant, to establish that he was making payments pursuant to the section 160 Assessment, would need to establish that he was using his own assets to make such payments and not assets that he was holding in trust for the Estate. Since the Appellant is seeking a refund that would be paid to him personally,

it seems to me that the Appellant would need to establish that he personally paid the debt using his assets, not assets that he was holding in trust for the Estate.

[28] The fair market value of the assets that the Appellant received as part of the residue of the Estate (and which he was holding in trust) is not known. The shares that the Appellant had received in the golf course company were not part of the residue of the Estate. However, Justice Taylor, did note, in relation to the value of the assets that were part of the residue, that:

> 30 According to the inventory, the residue consisted of the following specified property under the following headings:
>
> | | |
> |---|---|
> | Clothing, jewellery, household goods and furniture | $ 2,300.00 |
> | Farm machinery and snow blower | 39,000.00 |
> | One-third interest in farm machinery, other machinery and tools, livestock, and farm produce | 87,066.67 |
> | Vehicles | 40,000.00 |
> | Real Estate | 187,750.00 |
> | Two bank accounts | 284,750.00 |

[29] The total value of the assets that were included as part of the residue of the Estate (using the amounts identified above) was $640,867. As well since Justice Taylor held that the $64,000 investment was part of the residue, it would appear that this investment should be added to the above. As a result, the total value of the assets that formed part of the residue of the Estate was $704,867. The total amount of the payments made by the Appellant after December 12, 2005 (the date of the Order of Justice Taylor) were:

Date of Payment	**Amount**
December 23, 2005	$173,000
February 6, 2006	$150,000
March 23, 2006	$247,290
Total:	$570,290

[30] The total amount of the payments was less than the value of the assets (based on the values as stated in the inventory of the Estate) that the Appellant was holding

in trust and which he was ordered to return to the Estate. Counsel for the Appellant indicated during the hearing of this Motion that an appeal from the decision of Justice Taylor had been filed and a settlement had been reached but there was no indication of when the matter was settled or how it was settled.

[31] To further cloud the issue, when the Appellant made the three payments referred to above he included with the payment the remittance form for the Estate of the late Delmar Currie. The remittance form that the Appellant would have received with the section 160 Assessment differed from the remittance forms for the Estate. In the remittance form that accompanied the section 160 Assessment, the following appears on the left hand side:

> Remitted by:
> …
> CARL CURRIE
> …

[32] It is clear in the remittance form that accompanied the section 160 Assessment that the payment was being remitted by someone other than the tax debtor as the following appears on the right hand side of this form:

Assessment in respect of: …	
Name … ESTATE OF THE LATE DELMAR CURRIE	
Account number… 108393661 RI	When you make inquiries, please quote this number. …

[33] In contrast, the remittance form for the tax debt of the Estate only identifies the Estate of the late Delmar Currie. As noted above, the Appellant only used the remittance forms for the Estate of the Late Delmar Currie when he made the three payments that were made after December 12, 2005.

[34] If the three payments made by the Appellant after December 12, 2005 were not made by the Appellant pursuant to the section 160 Assessment, then it would appear that the Appellant would not be entitled to a refund even if the year of the transfer was 1997 (which would result in the least amount for which the Appellant should have been assessed based on the three possible years of 1997, 1999 and 2000). As noted above, if the year of the transfer of property was 1997, the amount of the assessment that should have been issued under section 160 of the *Act* was $246,876

but the only payment made by the Appellant after the date that he was assessed under section 160 of the *Act* (February 3, 2004) and before December 12, 2005 was $50,000. Any payments that the Appellant may have made prior to February 3, 2004 would not be payments that the Appellant was making pursuant to the section 160 Assessment.

[35] It seems to me that whether the Appellant can establish that the payments that he was making after December 12, 2005 were being made by him pursuant to the section 160 Assessment is an important element that the Appellant would have to establish prior to commencing any action for contempt of court. It does not seem to me that this issue should be resolved in the context of a contempt of court proceeding. This issue would have to be resolved either by agreement of the parties or by a court of competent jurisdiction before the Appellant can bring a motion for contempt.

[36] Given the very significant uncertainties related to the year in which the property was transferred to the Appellant (and hence the amount of the adjustment that would have to be made to the assessment issued under section 160 of the *Act* to give effect to the Judgment) and the amount that the Appellant paid pursuant to the assessment issued under section 160 of the *Act*, in my opinion the Appellant has not established that there is a *prima facie* case for contempt in relation to whether there has been a failure to comply with the Judgment.

[37] It seems to me that it is also important to review the jurisdiction of this Court. The jurisdiction of the Court is set out in section 12 of the *Tax Court of Canada Act* which provides as follows:

> 12. (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, the *Excise Act, 2001*, Part IX of the *Excise Tax Act*, the *Income Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act, 2006* when references or appeals to the Court are provided for in those Acts.

[38] On an appeal to this Court in relation to an assessment issued under the *Act*, what the Court may do in relation to the disposition of the appeal is set out in section 171 of the *Act* which provides that:

> 171. (1) The Tax Court of Canada may dispose of an appeal by

> (*a*) dismissing it; or
>
> (*b*) allowing it and
>
> (i) vacating the assessment,
>
> (ii) varying the assessment, or
>
> (iii) referring the assessment back to the Minister for reconsideration and reassessment.

[39] In the decision of the Federal Court of Appeal in the case of *Main Rehabilitation Co.* v. *R.*, (2004 FCA 403) (leave to appeal to the Supreme Court of Canada was dismissed (343 N.R. 196 (note))), the Federal Court of Appeal made the following comments:

> 8 This is because what is in issue in an appeal pursuant to section 169 is the validity of the assessment and not the process by which it is established (see for instance the *Consumers' Gas Co.* v. *R.* (1986), 87 D.T.C. 5008 (Fed. C.A.) at p. 5012). Put another way, the question is not whether the CCRA officials exercised their powers properly, but whether the amounts assessed can be shown to be properly owing under the Act (*Ludco Enterprises Ltd./Entreprises Ludco Ltée* v. *R.* (1994), [1996] 3 C.T.C. 74 (Fed. C.A.) at p. 84).

[40] Therefore the only issue in an appeal to this Court is the validity of an assessment and the only remedies that this Court can grant if an appeal is allowed are to vacate the assessment, vary the assessment or refer the matter back to the Minister of National Revenue for reconsideration and reassessment. There is no power or authority to order a refund. Counsel for the Appellant stated that in his opinion Justice Rossiter (as he then was) was clearly contemplating a refund when he issued the Judgment. In particular he referred to the comments of Justice Rossiter (as he then was) in relation to the interest that was paid for the period after February 3, 2004. In paragraphs 21 and 22 of his decision, Justice Rossiter (as he then was) stated that:

> 21 The Appellant's objection is to the paying of approximately $75,000 interest accrued against him on the Estate debt after Assessment #1. The Appellant's appeal is from Assessment #1 which does not include that $75,000….
>
> 22 ….Also, the Appellant specifically wanted to be repaid the $75,000, paid by him as interest, post the Assessment #1. This amount will be deleted from the

> assessment, per my previous comment and most certainly should be deleted to be consistent with *Algoa Trust, supra*, …

[41] Although the Appellant had requested that he be repaid the $75,000 amount, in paragraph 22 (above) it is indicated that this amount was to be deleted from the assessment. The interest of approximately $75,000 was interest on the amount of $544,147 for the period after the date on which the Appellant was assessed for this amount (February 3, 2004) and therefore it was not included in the assessment issued on February 3, 2004. As a result it was not necessary to delete this interest from the section 160 Assessment as it was not included in this assessment. In any event, the only power or authority that this Court has when an appeal is allowed, is the power or authority to vacate the assessment or change the assessment – either directly (by varying the assessment) or indirectly (by referring the matter back to the Minister of National Revenue for reconsideration and reassessment). Therefore the only power or authority of this Court in this case would have been to vacate or change the assessment that was under appeal which was the assessment under section 160 of the *Act* in the amount of $544,147 that had been issued on February 3, 2004. It seems to me that this Court does not have the jurisdiction to resolve any dispute arising as a result of how the Canada Revenue Agency has allocated or treated any payments made to it and in particular this Court does not have the jurisdiction to order any refund, including any refund of interest. It should also be noted that the Judgment itself only addresses the amount that should have been assessed and in effect, varies the amount of the section 160 Assessment.

[42] It also seems to me that the limited jurisdiction of this Court is relevant in this matter in relation to the two disputes referred to above – the year in which the transfer of the property occurred and the amount that the Appellant paid pursuant to the section 160 Assessment.

[43] Since the first dispute relates to the amount that the Appellant should have been assessed under section 160 of the *Act*, it seems to me that this Court would have jurisdiction to resolve this matter if the parties are unable to reach an agreement on the year in which the property was transferred to the Appellant.

[44] However, since the second issue does not relate to the amount of the assessment but rather to the amount that the Appellant has paid pursuant to such assessment, it seems to me that this Court would not have the jurisdiction to resolve this dispute, if the parties are unable to agree upon the amount that the Appellant paid pursuant to the section 160 Assessment. This is not a dispute related to the amount of the assessment but is a dispute related to the amount of the payments made under the

assessment. This is not a matter over which jurisdiction has been granted to this Court under the *Tax Court of Canada Act*.

[45] Since the Appellant has not established a *prima facie* case of contempt of court, the question of whether the Minister of National Revenue or the Canada Revenue Agency is the person who should be ordered to appear in relation to the allegation of contempt is a moot question. However, since Counsel for the Respondent had raised the argument that the Minister of National Revenue could never be found to be in contempt, I would like to make a few comments on this argument. This argument is based on the comments of Justice Bowie in *Kumar* v. *The Queen*, 2004 TCC 521, [2004] 4 C.T.C. 2477, 2004 DTC 3048. In paragraph 5 of *Kumar*, Justice Bowie stated that:

> 5 I should make it clear at the outset that this motion cannot succeed in respect of "the Minister of National Revenue". It is well settled that a Minister of the Crown cannot be committed for contempt because of acts or omissions of the officers of her department: see *Bhatnager* v. *Canada*, [1990] 2 S.C.R. 217.

[46] In *Bhatnager*, above, the principal issue, as described by Justice Sopinka (who was writing on behalf of the Supreme Court of Canada), was as follows:

> 1 **…** The principal issue is whether acceptance of service of the order by the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt.

[47] Justice Sopinka made the following comments in relation to the requirement of knowledge of the order before a person can be found to be in contempt of that order:

> 16 On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a precondition to liability in contempt….
>
> …
>
> 17 This lengthy history of a strict requirement at common law that the party alleging contempt must prove actual knowledge on the part of the alleged contemnor is inconsistent with the submission that a rebuttable presumption arises in every case upon service of the order on the solicitor. In my opinion, a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn. In the case of Ministers of the Crown who administer large departments and are involved in a

> multiplicity of proceedings, it would be extraordinary if orders were brought, routinely, to their attention. In order to infer knowledge in such a case, there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister. Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases the inference of knowledge will always be available where facts capable of supporting the inference are proved: see *Avery* v. *Andrews* (1882), 51 L.J. Ch. 414.
>
> 18 This does not mean that Ministers will be able to hide behind their lawyers so as to flout orders of the court. Any instructions to the effect that the Minister is to be kept ignorant may attract liability on the basis of the doctrine of wilful blindness. Furthermore, the fact that a Minister cannot be confident in any given case that the inference will not be drawn will serve as a sufficient incentive to see to it that officials are impressed with the importance of complying with court orders.

[48] It therefore seems to me that it is not an absolute rule that the Minister of National Revenue could never be found to be in contempt but the requirement that the Minister of National Revenue must have knowledge of the judgment would mean that only in very exceptional circumstances could the Minister of National Revenue be found to be in contempt of a judgment of this Court following a tax appeal. There was no evidence that the Minister of National Revenue had any knowledge of the Judgment and since this was an informal procedure case, it is very unlikely that the Minister of National Revenue had any knowledge of the Judgment or that the doctrine of wilful blindness would apply in this case.

[49] Also, as noted above, contempt of court as provided in section 22 of the *Rules* provides that the person must have wilfully disobeyed a process or order of the court. Therefore, not only does the Appellant have to prove that the person who is alleged to be in contempt of court had knowledge of the order or judgment but the Appellant must also prove that such person *wilfully* disobeyed such process or order. As a result, in any event, it seems to me that the Minister of National Revenue would not be the appropriate person to respond to an allegation of contempt of the Judgment in this case.

[50] Justice Sopinka also dealt with the other argument related to vicarious liability:

> Vicarious Liability
>
> 24 Counsel for the respondent presented this Court with elaborate arguments in support of the proposition that the appellants ought to be held liable in contempt in the absence of knowledge of the breached order, on the basis of some form of vicarious liability, variously referred to as the principle of delegation and the theory of identification. Counsel sought to analogize the appellants to licensees and

corporations in relation to which these principles have been applied in the past: see, e.g. *Allen* v. *Whitehead*, [1930] 1 K.B. 211; and *Canadian Dredge & Dock Co.* v. *The Queen*, [1985] 1 S.C.R. 662.

25 Given the premise that liability in contempt is essentially criminal liability, the respondent's main hurdle on this issue is that, in general, vicarious liability is unknown to the criminal law. As Estey J. stated in *Canadian Dredge & Dock Co.*, at p. 692:

> In the criminal law, a natural person is responsible only for those crimes in which he is the primary actor either actually or by express or implied authorization. There is no vicarious liability in the pure sense in the case of the natural person.

However, the respondent, while conceding that the doctrine of respondeat superior does not apply, urges that either or both of the sub-doctrines of delegation and identification ought to ground the appellants' liability in contempt. There are, to my mind, at least two fatal objections to the respondent's position on this issue.

26 First, the principle of delegation, according to which an individual may be held criminally liable for the acts of his or her delegate, has long been understood to apply, if at all, to cases in which the delegator is under a specific statutory duty that has been contravened by the delegate: see *A.W. Mewett and M. Manning, Criminal Law* (2nd ed. 1985), at p. 64; *Allen, supra*, per Lord Hewart C.J. at p. 220; and *R.* v. *Stevanovich* (1983), 7 C.C.C. (3d) 307 (Ont. C.A.), per Dubin J.A. (as he then was), at p. 315. It is not necessary to express a view on the correctness of this apparent departure from the general rule against vicarious liability in the criminal law, since it is sufficient to observe that in the circumstances of the present case the appellants are under no analogous duty.

27 Second, the theory of identification, according to which a corporation may be held criminally liable for the acts of the directing mind of the corporation, is uniquely inapplicable to natural persons. As Estey J. explained in *Canadian Dredge & Dock Co.*, at p. 693, the theory of identification "is a court-adopted principle put in place for the purpose of including the corporation in the pattern of criminal law in a rational relationship to that of the natural person." Since a corporate entity cannot have a mind of its own, it was necessary to select some responsible official (the directing mind) whose mind was identified as that of the corporation. To now apply the theory of identification to natural persons would be to turn the principle on its head. It would be, in my view, a manifestly unjust application to an individual of simple vicarious liability under another name.

28 In light of these conclusions, it is unnecessary to consider whether a contrary interpretation of the Federal Court Rules or a finding of vicarious criminal liability would constitute a violation of ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms; though it seems clear that any argument in favour of such liability would

> have [page231] grave difficulty overcoming the decision of this Court in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486. (See also *R.* v. *Burt*, [1988] 1 W.W.R. 385 (Sask. C.A.), per Bayda C.J.S.)

[51] While the Supreme Court of Canada held that, in general, vicarious liability would not apply to criminal law (including contempt), the Supreme Court of Canada noted that it was not necessary in that case to express a view in relation to the correctness of the principle of delegation.

[52] The other person identified by the Appellant was the Canada Revenue Agency. In *Ayangma* v. *The Queen*, [2002] F.C.J. No. 108, 2002 FCT 79 (affirmed on appeal to the Federal Court of Appeal, 2003 FCA 46), Justice MacKay noted that a federal government department was not a proper respondent to an allegation of contempt because the department is not a person. However, the Canada Revenue Agency is a body corporate (subsection 4(1) of the *Canada Revenue Agency Act*) and therefore is a person. As a result the comments of Justice MacKay related to federal government departments would not apply to the Canada Revenue Agency and the Canada Revenue Agency is a person who could be a respondent to an allegation of contempt of court.

[53] Since, as noted above, the Appellant has not established a *prima facie* case for contempt in relation to the Judgment, the Appellant's motion for an order pursuant to subsection 22(2) of the *Rules* requiring the Minister of National Revenue or the Canada Revenue Agency to appear before a judge of this court in relation to an allegation that such person is in contempt of court is dismissed with costs.

Signed at Ottawa, Canada, this 5th day of March 2012.

"Wyman W. Webb"

Webb J.

CITATION:	2012TCC62
COURT FILE NO.:	2006-1685(IT)I
STYLE OF CAUSE:	CARL CURRIE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Canada
DATE OF HEARING:	February 9, 2012
REASONS FOR ORDER BY:	The Honourable Justice Wyman W. Webb
DATE OF ORDER:	March 5, 2012

PARTICIPANTS:

Counsel for the Appellant:	David W. Hooley Robin Aiken
Counsel for the Respondent:	Cecil S. Woon

COUNSEL OF RECORD:

For the Appellant:

Name:	David W. Hooley Robin Aiken
Firm:	Cox & Palmer Charlottetown, Prince Edward Island

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada