In 2010, Ms. Ficek (along with 83 other taxpayers and many more in 2011) made a donation through Global Learning Gifting Initiative (GLGI), a tax shelter registered with the CRA. In 2011, the director of the CRA's Winnipeg tax centre created a new policy, ostensibly to improve compliance with the Act by verifying taxpayer claims before issuing a refund. "GLGI was selected as a pilot for this New Policy because it had been audited for the 2004-2009 tax years and all charitable credits had been denied." All taxpayers who had contributed in 2010 to the GLGI tax shelter—including Ms. Ficek—were informed that they would not be issued assessments or refunds until the completion of the audit of GLGI's 2010 tax year.

The FC was asked to determine whether the CRA's reason for delaying Ms. Ficek's assessment was consistent with the minister's duty to assess with all due dispatch (subsection 152(1)):

> 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 and determine
>
> (a) the amount of refund, if any, to which the taxpayer may be entitled [under certain provisions] for the year; or
>
> (b) the amount of tax, if any, deemed by [certain provisions] to be paid on account of the taxpayer's tax payable under this Part for the year.

The FC said that in interpreting the provision it is important to bear in mind its purpose, which is "to bring some certainty to the taxpayers' financial affairs at the earliest reasonably possible time." To determine whether the minister has met her duty, the court must first examine the real purpose of the CRA's delay in assessing. If a proper purpose—such as one that relates to examining a taxpayer's return and ascertaining his tax liability—underlies the CRA's decision to delay assessing a taxpayer, the court may find that the minister has acted with all due dispatch or its equivalent as established by the jurisprudence: with all due diligence or within a reasonable time.

In *Ficek*, the director of the Winnipeg tax centre attempted to portray the delay as necessary for the verification of donations. On the basis of the evidence, however, the FC found that the true purpose underlying the new policy was to deter the taxpayer (and many others) from participating in the GLGI tax shelter in subsequent years. Internal memorandums and e-mails during the new policy's development included a comment that "[w]ithholding the refunds for even a year or two until the audit of the tax shelter is complete may be sufficient to deter further participation" in GLCI's program. The court held that the intended deterrence was an improper purpose because it did not relate to examining the taxpayer's return or ascertaining her tax liability:

> To the extent that there may have been some basis for awaiting the audit, the decision to audit is so tainted by the real reason for the New Policy that the audit is an excuse for delay not a reason for delay.

Less than a month before, the attorney general unsuccessfully attempted to have the judicial review hearing dismissed on the ground of mootness. Phelan J, who also presided over the hearing for a declaration, concluded that the judicial review in the nature of a mandamus application—to require the CRA to issue an assessment for 2010—was moot because the CRA had issued the assessment within a month of the judicial review hearing. However, the FC exercised its discretion and dismissed the motion: the new policy was evasive of review because of the CRA's control over the timing of assessments, the issue was of a continuing nature and of public and national importance because it affected the national tax system, and the resolution of the issue would have a practical effect on the applicant and others. Moreover, judicial economy favoured the resolution of the dispute, and this resolution was a proper basis for the exercise of judicial jurisdiction.

Given the reasons for dismissing the motion regarding the judicial review for declaratory relief, it may not be surprising that the audit of GLGI's 2010 tax year was viewed as nothing more than an excuse for delaying the assessment of taxpayers who had contributed to the GLGI tax shelter. The FC granted Ms. Ficek a declaration that the minister failed to comply with the duty to assess with all due dispatch.

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No Credit for Tax Withheld

In *Anonby* (2013 TCC 184), the TCC said that it was unable to require the CRA to recognize and give Mr. A credit for taxes that Mr. A said were withheld by his employer. Mr. A showed that his employer owed him more gross pay than the CRA's reassessment recognized. He filed his tax return reporting $42,000 of income, including about $11,000 for withheld taxes and $2,800 for CPP and EI, and on assessment was given a refund of about $4,000. But his employer had not remitted these withholdings, and the CRA refused to recognize the income tax withholdings in assessing the amount of tax owed. The CRA's reassessment reduced Mr. A's reported income to $29,000, which was less than the originally reported amount, but the CRA gave no credit for withheld taxes, and thus the reassessment resulted in Mr. A having to pay more tax and CPP than shown in his original return.

Mr. A requested that the TCC reinstate his original assessment for a higher amount and order the CRA to recognize and give him credit for tax that his employer had withheld. The TCC declined, saying that its "authority is limited to making certain decisions relating to the [taxpayer's] tax liability, not the collection of that tax." The TCC added that both the FCA and the TCC have "consistently held that [the TCC] does not have jurisdiction to determine whether tax has been withheld at source." Because the TCC could not order the CRA to recognize the withheld taxes, the increase in Mr. A's income requested by the taxpayer would have increased his tax owing above the level in the reassessment. (The TCC noted that "[i]t is well-settled that the Court cannot increase the assessment under appeal," and it could not do so even though on the facts it was the taxpayer and not the minister who had requested the increase.) The TCC commented: "The law does, however, throw a taxpayer in Mr. Anonby's position a lifeline by suggesting [that] the Federal Court has authority to deal with collection matters."

However, it is not clear what the FC can do in these circumstances. The jurisprudence referred to by the TCC in *Anonby* consistently cites the power of the FC in subsection 222(2), which says that a tax debt "is a debt due to Her Majesty and is recoverable as such in the Federal Court or any other court of competent jurisdiction." The provision says that the tax debt is due to the Crown, and gives no right to an employee to enforce the debt via an application to the FC. Because the debt represented by unremitted source deductions belongs to and is due to the Crown, it seems that only the Crown can enforce payment thereof.

Arguably, if the CRA attempts to enforce a tax debt against the employee by pursuing him through the FC process (under section 223) and, for example, seizing property, the employee may apply to the FC to stay the execution on the ground that he already paid the amount by way of source deductions. However, if the employer has not remitted the source deductions, can the employee successfully argue that he paid the amount? Subsection 153(3) deems an employee to have received an amount withheld, but it does not deem the tax to have been paid to the CRA at the time of withholding.

For Mr. A, the better route may be through the BC Superior Court (he resided in that province) or Small Claims Court to claim the unpaid wages from his employer as an employment debt. One hopes that a provincial court would not apply the deemed receipt rule in subsection 153(1) and deny Mr. A a remedy. Also, the provincial court may conclude that for the purposes of subsection 227(1), which states that "[n]o action lies against any person for deducting or withholding any sum of money in compliance or intended compliance with this Act," an employer who withholds but does not remit has not withheld "in compliance with the Act." (A provincial court's jurisdictional concern may be allayed because subsection 222(2) grants jurisdiction to the FC or to "any other court of competent jurisdiction.")

An employee may face a problem similar to Mr. A's if the CRA has his wages garnished to satisfy a tax debt but the employer fails to remit the garnished amount. (This situation may arise if the employer has financial troubles of its own.) The CRA's requirement to pay is the employer's authority to withhold the garnished amount from the employee's wages; but if the employer does not remit the garnished funds to the CRA, the employee gets no credit for taxes paid. Although subsection 224(2) says that "[t]he receipt of the Minister for moneys paid as required under this [garnishment] section is a good and sufficient discharge of the original liability to the extent of the payment," if the employer does not remit the garnished money to the CRA, there is no deemed receipt of the amount by the minister, and the employee cannot claim credit for the payment of his tax debts. The employee may have a right to sue the employer for withheld wages, but suing his existing employer may not be the wisest choice if the employee wants to retain his job.

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Family Trusts Face Higher Tax Rates

As announced in the March 2013 federal budget, the government recently began its consultation on possible measures to eliminate the tax benefits that arise from taxing at graduated rates a trust created by a will (a testamentary trust) and an estate (after a reasonable period of administration). Finance is accepting comments on its newly released consultation paper on the topic until December 2, 2013.

Currently, a trust created by a will and an estate pay tax on their income at the same graduated rates as an individual does. The establishment of a testamentary trust under a will creates a new taxpayer that can provide annual tax savings for the trust beneficiaries. A spousal trust created in a will has another tax advantage: assets can be transferred by a will to a spousal trust without the deceased spouse having to pay tax on related capital gains otherwise deemed realized at death, and the tax is deferred until the death of the surviving spouse. The principal conditions for a spousal trust are that only the surviving spouse is entitled to receive the trust's income and that only she is entitled to the trust capital during her lifetime.