



INCOME TAX

PRACTICE

Appeal from Tax Court of Canada (T.C.C.) order (2018 TCC 55) varying its judgment in first matter involving respondent's appeal of Minister of National Revenue's assessment of respondent's income tax for certain taxation years — Appellant sought enhanced costs for proceedings in Tax Court because of settlement offer it made that was not accepted — Appeal involving two overlapping matters with common issue as to validity, appropriateness of costs T.C.C. awarded for proceedings therein — In first matter, when respondent appealed Minister's assessment of income tax for certain taxation years, respondent succeeded in T.C.C.; received costs on usual scale for those proceedings — Appellant appealed to Federal Court of Appeal, succeeded therein, received costs on usual scale for, among other things, proceedings in T.C.C. — Respondent appealed to Supreme Court but appeal dismissed with costs — As result, Federal Court of Appeal's decision concerning costs for proceedings in T.C.C. left undisturbed — Second matter arising after respondent's success in T.C.C. in first matter but before Federal Court of Appeal heard appellant's appeal — Respondent brought motion in T.C.C. to vary T.C.C.'s costs award; sought enhanced costs for proceedings in T.C.C. because of settlement offer respondent made — T.C.C. granted respondent's motion, varied its judgment in first matter — Whether T.C.C.'s awarding of costs for proceedings therein valid, appropriate — When Supreme Court determined first matter, dismissing respondent's appeal, *res judicata* triggered — Under that doctrine, entitlement to relief that has been finally determined cannot be relitigated by same parties in another proceeding — Entitlement for costs in proceedings in T.C.C. raised, decided in first matter — Cannot be relitigated in second matter — Appeal presently before Federal Court of Appeal representing impermissible collateral attack against Supreme Court's judgment dealing with that issue — Supreme Court dismissed appeal from judgment of Federal Court of Appeal, leaving Federal Court of Appeal's judgment to stand—including its award of costs for proceedings in T.C.C. — T.C.C.'s order in second matter wholly contingent on order it made in first matter — Rule that authorized order in second matter found in *Tax Court of Canada Rules (General Procedure)* (Rules), SOR/90-688a, s. 147(7) — Under s. 147(7), T.C.C. having power to give directions to taxing officer concerning costs order already made by T.C.C. or to reconsider that costs order — When Federal Court of Appeal issued judgment allowing appellant's appeal, setting aside T.C.C.'s judgment (including its costs award), entire basis for Rules, s. 147(7) order in second matter fell away, with result that order no longer had legal effect — Thus, Federal Court of Appeal's judgment rendering both T.C.C.'s judgment (including its costs award), s. 147(7) order nullity — To have appeal from order, there must be an order — Because s. 147(7) order (order of T.C.C. in second matter) nullified, appeal from that order also becoming nullity — Thus, appeal that can be prosecuted in Federal Court of Appeal no longer existing — While this sufficient to explain why appellant's appeal had to be dismissed, law concerning orders, judgments, their effect reviewed — Appellant's argument that enhanced costs not argued in appeal in Federal Court of Appeal, that free to argue now rejected since ignoring that doctrines against relitigation applying to arguments that could have been raised as well as those that were actually raised; otherwise, would be no end of litigation — "Costs", "enhanced costs" not separate issues — When court awarding costs, understood to be deciding issue of entitlement to costs fully, finally, subject only to narrow exceptions under *Federal Courts Rules*, SOR/98-106 — When Federal Court of Appeal staying appeal in second matter on parties' consent, pending resolution of first matter, Court not agreeing, advising or condoning that appeal somehow immunized against *res judicata* — Also, too late for appellant to avail itself of mechanism of *Federal Courts Rules*, r. 403 since appellant not moving under that rule; failed to ask for extension of time under *Federal Courts Rules*, r. 8 to do so;

regardless, extension of time would not be granted — Finally, insurmountable problem remaining even if appellant's submissions accepted since order appealed from in second matter (order which was subject of appeal herein) no longer existing — *Under Federal Courts Rules*, r. 3, Court can act to promote, enforce, vindicate certain prized values of our litigation system such as efficiency, judicial economy, finality — While issues of *res judicata*, finality usually raised by party, Federal Court of Appeal can raise issue in circumstances such as present case — “Fairness” not exception to principle of finality of judgments that applies in this case — Fairness relevant to other doctrines against relitigation such as issue estoppel, abuse of process; but present case not one of either of these — Appeal in first matter determining appeal in second matter — Both parties should have informed Federal Court of Appeal in first matter about existence of second matter — Appeal dismissed.

CANADA V MACDONALD (A-118-18, 2021 FCA 6, Stratas J.A., reasons for judgment dated January 19, 2021, 13 pp.)