Federal Court  Cour fédérale

Date: 20150507

Docket: T-701-14

Citation: 2015 FC 600

Ottawa, Ontario, May 7, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

BRIAN WILLIAM KARAM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in respect of a decision by the Appeals Division of the Canada Revenue Agency (CRA) dated February 26, 2014, pertaining to the calculation of the applicant's 2007 taxation year.

[2] The applicant seeks an order quashing the CRA's decision, costs and such further and other relief as this Court may consider just.

I. Background

[3] On September 24, 2009, CRA reassessed the applicant's 2007 taxation year on the basis that the applicant's reported capital gain relating to the sale of properties made by the Kanata Estates Limited Partnership (KLP) was business income. The applicant's share of profit from the sale was determined by the CRA to be $1,898,828.00. The allowed reserve was calculated to be $919,978.00 and the applicant's share of partnership income after taking into account the reserve was $978,850.00 (the 2009 reassessment).

[4] On November 12, 2009, the applicant filed a notice of objection to the CRA regarding the reassessment on the basis that the gain was not on the income account.

[5] On November 17, 2010, CRA sent the applicant a letter confirming the reassessment and attached a notification of confirmation (the 2010 notice). The notice of confirmation states the following:

> Accordingly, the profit of $9,788,600 from the sale of the properties known as Moore Property, McKinley Property, and Crowe Property is income from a business under subsection 9(1) of the Income Tax Act. Therefore, your portion of the profit in the amount of $978,850 ($9,788,600 x 9.9999%) has been included in your income according to section 3.
>
> [. . .]
>
> In addition, you made a profit of $978,850 for the sale of the properties described above. In calculating how much to include in income from a business, the partnership has been allowed a reserve of $9,199,872. Accordingly, your portion of the reserve amount allowed is $919,978 ($9,199,872 x 9.9999%) under paragraph 20 (1) (n) of the Income Tax Act.
>
> [My emphasis added]

[6] The applicant appealed CRA's position to the Tax Court of Canada for a determination whether the gain realized on the sale is on account of income or capital. On November 4, 2013, Mr. Justice Steven K. D'Arcy dismissed the appeal and held that the gain from the sale was business income rather than capital gain (see *Karam v Canada*, 2013 TCC 354, [2013] TCJ No 313).

[7] On December 5, 2013, the applicant sent a letter to CRA requesting that CRA use the 2007 profit in the amount of $978,850.00 determined on the 2010 notice and asked CRA to recalculate his share of the KLP's income based on his interpretation of the wording of the 2010 notice.

II. Decision Under Review

[8] By a letter dated February 21, 2014, CRA informed the applicant that his share of KLP's income was as assessed in the notice of reassessment dated September 24, 2009 (the 2014 decision).

III. Issues

[9] The applicant raises the following issues:

1. Does the Federal Court have jurisdiction in relation to the issue raised in this application?
2. Did CRA err in law in its 2014 decision by refusing to use the 2007 profit of $978,850.00 as determined by the 2010 notice, for purposes of computing the 2007

income and the related 2007 tax to be collected from the applicant in relation to the sale?

[10] The respondent raises one issue: did the CRA err in law in informing the applicant that his share of KLP's income was as assessed in the notice of reassessment dated September 24, 2009?

[11] I would rephrase the issues as follows:

A. Does this Court have jurisdiction to review the presented issue; if so, what is the standard of review?

B. Did CRA err in law in informing the applicant that his share of KLP's income was as assessed in the notice of reassessment dated September 24, 2009?

IV. Applicant's Written Submissions

[12] The applicant submits CRA's action in computing and collecting 2007 tax involves a question of law that is reviewable on the standard of correctness (see *Walker v Canada*, 2005 FCA 393, [2005] FCJ No 1952 [*Walker*]; and *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*]).

[13] First, the applicant submits this Court can judicially review a step in the CRA's collection process (see *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250, [2013] FCJ No 1155 (FCA) [*JP Morgan*]). He argues the matter in front of this Court is different from what was decided at the Tax Court and it concerns collection. Here, he does not

challenge the validity of the assessment, but is rather challenging the correctness of CRA's administrative action in overstating the 2007 profit.

[14] Second, the applicant submits CRA erred in law by refusing to base its decision on the final determination stated in the 2010 notice. He argues the final determination in the 2010 notice is legally binding on both the taxpayer and the CRA (see *Canada v Anchor Pointe Energy Ltd*, 2007 FCA 188, [2007] FCJ No 687). He states in this case, CRA erroneously varied his 2007 profit in its 2014 decision.

[15] The applicant submits the "profit" of a business is defined by the Supreme Court of Canada in *Canderel Ltd v The Queen*, [1998] 1 SCR 147, [1998] SCJ No 13 as "to be determined by setting against the revenues from the business for that year the expenses incurred in earning said income…". He argues paragraph 20(1)(n) of the *Income Tax Act*, RSC 1985, c 1 [the Act] allows a taxpayer's income to be reduced for a taxation year when part of the payment to be received from the sale of land is scheduled to be received after the end of the taxation year, which is known as a "reserve". He states in the present case, the 2010 notice set out the allowable reserve determined by CRA in the amount of $919,978.00.

[16] He further submits this reserve can only be deducted from income pursuant to paragraph 20(1)(n) of the Act, but not from a taxpayer's profit. The quantum of the profit is necessary to determine the quantum of the reserve with the following formula: *Profit x (amount not due until after the end of the year / total sale price) = reserve* (see *Wolofsky v Canada (Minister of National Revenue)*, 2001 FCA 119, 204 FTR 320).

[17] The applicant submits the allowable reserve is calculated as a "reasonable fraction of the profit" and it is not mathematically possible for the reserve to be deducted against the revenues from the business. Here, the 2010 notice determined the applicant's 2007 profit from the sale to be $978,850.00. In the 2014 decision, the CRA determined the applicant's 2007 profit in relation to the sale to be $1,898,828.00 rather than $978,850.00 as determined by the 2010 notice. The CRA erred in law in its decision because a deduction of a reserve cannot be made against the revenue from the business for the purpose of calculating profit.

[18] The applicant acknowledges the use of the term "profit" in the 2010 notice by the CRA appears to be an error. However, he argues the 2010 notice is CRA's final determination of his 2007 profit for the purposes of determining the 2007 income and the resulting income tax. He quotes in part the CRA's 2014 decision to this effect, "[t]here is no legislative authority under which the 2007 Notice of Assessment or Notice of Confirmation can now be reconsidered."

[19] The applicant cites *Greene v The Queen*, 2010 TCC 162, [2010] 6 CTC 2103 [*Greene*] where in that case, the incorrect provisions of the Act that were set out in the notice of confirmation were not fatal to the CRA's position and the Tax Court ruled the CRA was entitled to base its argument on the correct provisions. The applicant distinguishes the instant case from *Greene* arguing that here, the CRA could not have relied on subsection 152(9) of the Act to argue in the Tax Court appeal that the amount of the profit stated in the 2009 reassessment should be used instead of the amount stated on the 2010 notice, because the Act does not give any right of appeal to the CRA in relation to its own assessment.

[20] The applicant submits that to allow the 2014 decision referencing the 2009 reassessment amount to stand, would essentially be allowing the CRA to accomplish indirectly what it cannot accomplish directly. He argues a taxpayer should have certainty in relation to information prepared by the CRA.

V. Respondent's Written Submissions

[21] The respondent submits subsection 152(8) of the Act is "designed to relieve the Minister from detrimental consequences of errors in his department" (see *Canada v Riendeau*, [1989] FCJ No 1048 at paragraph 21, 31 FTR 123 [*Riendeau*]) and the purpose of this section is to ensure taxpayers would not be allowed to unduly benefit from a reduced income tax liability resulting from an error, defect or omission in the assessment or in any proceeding under the Act relating thereto.

[22] The respondent submits in the present case, CRA in its 2010 notice used unambiguous terms to describe the action taken: "[a]s stated in the enclosed Notice of Confirmation, we have confirmed the reassessment …". The CRA then went on to explain why it decided to confirm the reassessment by virtue of the 2009 reassessment.

[23] It agrees with the applicant that CRA incorrectly used the term "profit" to describe the amount of $9,788,600.00 in its 2010 notice for what it should have been termed as "income", referring to the KLP's profit minus the reserve. It admits the same error was repeated by CRA later on in the notification portion. It argues, however, such wording is an error that does not

displace the validity and binding effect of the 2009 reassessment as provided by subsection 152(8) of the Act.

[24] The respondent submits the unambiguous introductory portion of the 2010 notice confirming the 2009 reassessment should govern, which indicates the amount stated on the 2009 reassessment should apply.

VI. Analysis and Decision

A. *Does this Court have jurisdiction to review the presented issue; if so, what is the standard of review?*

[25] The Federal Court of Appeal in *JP Morgan* at paragraph 96, examined the Federal Court's jurisdiction in reviewing issues of tax appeal and concluded this Court does have jurisdiction over collection matters:

> There are areas, well-recognized in the case law, where judicial review may potentially be had in tax matters. Examples include discretionary decisions under the fairness provisions, assessments that are purely discretionary (such as the assessment under subsection 152(4.2) at issue in *Abraham, supra*), and conduct during collection matters that is not acceptable or defensible on the facts and the law (*Walker, supra*; *Pintendre Autos Inc. v. The Queen*, 2003 TCC 818).

[26] Here, the applicant correctly points out the issue in the present case is concerned with the manner of how CRA collects his 2007 income tax. The respondent does not dispute this.

[27] Where the jurisprudence has satisfactorily resolved the standard of review, the analysis need not be repeated (*Dunsmuir* at paragraph 62). In the present case, the issue involves a

question of law that is reviewable on the standard of correctness (*Walker* at paragraph 10; and *Dunsmuir*).

B. *Did CRA err in law in informing the applicant that his share of KLP's income was as assessed in the notice of reassessment dated September 24, 2009?*

[28] Subsection 152(8) of the Act provides:

152. (8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.	152. (8) Sous réserve des modifications qui peuvent y être apportées ou de son annulation lors d'une opposition ou d'un appel fait en vertu de la présente partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée être valide et exécutoire malgré toute erreur, tout vice de forme ou toute omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.

[29] I agree with Mr. Justice Bud Cullen's interpretation in *Riendeau* that the purpose of this section is "designed to relieve the Minister from detrimental consequences of errors in his department." To interpret otherwise, is to allow an act of injustice by providing taxpayers with a potential windfall resulting from CRA's unintentional errors.

[30] Here, the applicant does not argue the amount stated in the 2009 reassessment is wrong; rather, he argues the use of the word "profit" in the 2010 notice should be adopted. However, he concedes the use of the word "profit" in the 2010 notice is an error by the CRA.

[31] It is important to note that in the instant case, both parties concede the word "profit" used in the 2010 notice is an error. The parties are at issue on the effect of this error in collecting the applicant's 2007 income tax.

[32] In my view, the respondent is right to point out that the CRA in its 2010 notice used unambiguous terms to describe the action taken: "[a]s stated in the enclosed Notice Confirmation, we have confirmed the reassessment…". In light of this clear language, I disagree with the applicant's arguments to distinguish the present case from *Greene* and hence, I do not find the CRA's error in this case is fatal.

[33] It is clear to me that the 2010 notice is to confirm the findings from the 2009 reassessment. When reviewing all the correspondence together, the error of using the term "profit" as opposed to the proper term of "income" is not substantial as to deprive the meaning of the letter or to invite severe misinterpretation.

[34] Therefore, the CRA did not err in law in informing the applicant that his share of KLP's income was as assessed in the notice of reassessment dated September 24, 2009.

[35] For the reasons above, I would deny this application.

[36] By letter dated November 20, 2014, the parties informed me that they had agreed that the quantum of costs for this application should be $1,800.00 (taxes inclusive). I accept this figure.

[37] The application is therefore dismissed with costs to the respondent in the amount of $1,800.00 (taxes inclusive).

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs to the respondent in the amount of $1,800.00 (taxes inclusive).

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Income Tax Act*, RSC 1985 c 1 (5th Supp)**

20. (1) Notwithstanding paragraphs 18(1)(a), 18(1)(b) and 18(1)(h), in computing a taxpayer's income for a taxation year from a business or property, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto	20. (1) Malgré les alinéas 18(1)a), b) et h), sont déductibles dans le calcul du revenu tiré par un contribuable d'une entreprise ou d'un bien pour une année d'imposition celles des sommes suivantes qui se rapportent entièrement à cette source de revenus ou la partie des sommes suivantes qu'il est raisonnable de considérer comme s'y rapportant :
…	…
(n) if an amount included in computing the taxpayer's income from the business for the year or for a preceding taxation year in respect of property sold in the course of the business is payable to the taxpayer after the end of the year and, except where the property is real or immovable property, all or part of the amount was, at the time of the sale, not due until at least two years after that time, a reasonable amount as a reserve in respect of any part of the amount that can reasonably be regarded as a portion of the profit from the sale;	n) lorsqu'une somme incluse dans le calcul du revenu du contribuable tiré d'une entreprise pour l'année ou pour une année d'imposition antérieure au titre de biens vendus dans le cours des activités de l'entreprise est payable au contribuable après la fin de l'année et que tout ou partie de cette somme, au moment de la vente, n'est pas due avant une date qui tombe au moins deux ans après ce moment (sauf si les biens constituent des biens immeubles ou réels), un montant raisonnable à titre de provision se rapportant à toute partie de la somme qu'il est raisonnable de considérer comme une partie du bénéfice résultant de la vente;

…	…
152. (8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.	152. (8) Sous réserve des modifications qui peuvent y être apportées ou de son annulation lors d'une opposition ou d'un appel fait en vertu de la présente partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée être valide et exécutoire malgré toute erreur, tout vice de forme ou toute omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.
(9) The Minister may advance an alternative argument in support of an assessment at any time after the normal reassessment period unless, on an appeal under this Act	(9) Le ministre peut avancer un nouvel argument à l'appui d'une cotisation après l'expiration de la période normale de nouvelle cotisation, sauf si, sur appel interjeté en vertu de la présente loi :
(a) there is relevant evidence that the taxpayer is no longer able to adduce without the leave of the court; and	a) d'une part, il existe des éléments de preuve que le contribuable n'est plus en mesure de produire sans l'autorisation du tribunal;
(b) it is not appropriate in the circumstances for the court to order that the evidence be adduced.	b) d'autre part, il ne convient pas que le tribunal ordonne la production des éléments de preuve dans les circonstances.

FEDERAL COURT

SOLICITORS OF RECORD

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