Federal Court  Cour fédérale

Date: 20170418

Dockets: T-1970-14
T-1373-15

Citation: 2017 FC 371

Ottawa, Ontario, April 18, 2017

PRESENT: The Honourable Mr. Justice Phelan

Docket: T-1970-14

BETWEEN:

ESTATE OF NEWTON D. BILES

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Docket: T-1373-15

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JUDGMENT AND REASONS

I. Introduction

[1] This decision relates to two judicial reviews which were heard together. In T-1970-14 [1st JR], the Applicant seeks an Order for *mandamus* to require the Minister of National Revenue [Minister] to reassess the 2004 taxation year in accordance with an "agreement" alleged to have been made with Canada Revenue Agency [CRA] officials. In T-1373-15 [2nd JR], the Applicant requests judicial review of the denial of the Applicant's request to amend its 2004 tax return and to reassess the 2004 tax return to reduce the proceeds of a property disposition.

[2] The 1st JR seeks to enforce a proposal advanced by a CRA auditor to settle the value of property [the Proposal]. The 2nd JR challenges, among other things, a refusal to extend the time period to file a Notice of Objection.

The Applicant asks that the refusals be sent back for a redetermination of the 2004 tax year with specific directions to govern the redetermination.

[3] The relief sought in T-1970-14 is an Order:

1. requiring the Minister to reassess in accordance with the proposal made by the Minister's Toronto Centre Tax Services Office on or about May 13, 2013 or the proposal made by the Minister's Toronto Centre Tax Services Office on or about February 18, 2014; and

2. awarding costs plus HST.

The relief sought in T-1373-15 is an Order:

1. setting aside the Minister's decision communicated on or about August 4, 2015, denying the applicant's request to amend its 2004 income tax return and to extend the time for objecting to the reassessment of the applicant's 2004 taxation year; and

2. directing the Minister to receive the applicant's request to amend the 2004 tax return as an application for an extension of time to object to the reassessment of the year; or

3. directing the Minister to reassess the applicant's 2004 taxation year to reduce the proceeds of disposition in respect of the real property municipally known as 7 Austin Terrace, Toronto, Ontario to the fair market value thereof, being the sale price in the 2008 taxation year, and the capital gain thereon; and

4. awarding costs plus HST.

II. Background

[4] Newton D. Biles died on September 7, 1978. His will created a testamentary spousal trust for the benefit of his wife, Evelyn Biles. The trust assets included a property at 7 Austin Terrace, Toronto [the Property].

[5] In December 1998, Evelyn Biles transferred her interest in the Property to herself and her daughter, Shirley Scott, as joint tenants for nil consideration. There was confusion even at the hearing as to whether the transfer was of Evelyn Biles' purported 100% ownership of the Property to a joint tenancy or whether it was a transfer of Evelyn Biles' 50% ownership of the Property which 50% portion was to be placed in joint tenancy.

[6] After the transfer in 1998, the deeds had to be corrected because the land was being placed under Ontario's land titles system.

[7] On June 26, 2004, Evelyn Biles died and, as she was the beneficiary of the spousal trust, there was a deemed disposition of the Property at fair market value [FMV] which the Applicant reported as $2,885,000 ("$2.8 million"). This value was determined by the Applicant's own valuator and Evelyn Biles' estate representative. The Applicant reported proceeds of disposition of its interest in the Property of $737,278 and included in its income for the 2004 taxation year its share of taxable capital gains arising from the deemed disposition as $297,611.

[8] Although CRA had these calculations, the Applicant only disclosed part of the valuator's report to CRA. The reason for this abbreviated record was not explained, and CRA apparently did not require production of a complete valuation.

[9] In 2008, CRA conducted an audit of the Applicant's tax liability for the 2004 and 2005 taxation years. It disallowed a portion of the principal residence exemption claimed with respect to the Property, which increased the Applicant's taxable capital gain.

[10] On September 29, 2008, the Property was sold for $2,250,000 ("$2.25 million"). This sale occurred more than three years after the 2004 capital gain – consequently, the Applicant was not able to carry back its capital loss and apply this to the 2004 capital gain. The sale occurred approximately one month after the deadline for filing a Notice of Objection to the assessment for the 2004 taxation year.

The difference between the $2.8 million declared value and the $2.25 million realized sale value of the Property has been characterized by the Applicant as a "windfall" for the Minister.

[11] On October 23, 2008, the Applicant's accountant wrote to the Minister requesting that the Minister exercise his discretion to reassess the 2004 taxation year to reflect the $2.25 million FMV for the Property. That request was denied because the reassessment period for 2004 had expired.

[12] In summary, at this point the Applicant had overvalued the Property, suffered a loss on its claimed FMV, and run out of time to object.

[13] The Applicant then asked that the October 23 letter be treated as a Notice of Objection.

[14] That request was denied because the letter did not comply with procedural requirements: it failed to address the letter to the Chief of Appeals and did not state that the letter was an objection. Upon request for reconsideration, CRA again denied the request.

[15] On February 16, 2012, the Applicant filed a judicial review application of that final denial.

[16] On consent, Justice Hughes of this Court set the decision aside and referred the matter back to the Minister "for reconsideration at the second level of review by a person, or people, not previously involved in the matter".

A. *The Proposal*

[17] CRA had the review conducted by Lori Scott assisted by an auditor Christina Ling. They met with the Applicant's counsel and Ling made a "Proposal" to settle the matter. The parties have different views of the Proposal – a feature that runs through these judicial reviews.

[18] The Applicant described the Proposal as:

> (a) To change the applicant's 2004 and 2008 capital gains and losses, respectively;
>
> (b) Shirley Scott would amend her 2004 and/or 2008 returns to account for her 50 per cent interest in the Austin Property;
>
> (c) All rental income or losses from the Austin property reported by the application before the actual disposition in 2008 would not be adjusted;
>
> (d) The adjusted cost basis for the Austin property for the purposes of amending Ms. Scott's 2008 return would be based on the fair market value of the Austin Property in 1974 (when Mr. Biles died) if Ms. Scott did not have to report the deemed disposition in 2004 due to Ms. Biles' death.

The Respondent described the Proposal as:

> (a) reverse the capital gains included in the applicant's income for the 2004 taxation year from the deemed disposition of 7 Austin Terrace;
>
> (b) reverse the capital losses incurred by the applicant in its 2008 taxation year from the actual disposition of 7 Austin Terrace; and

(c) Shirley Scott (Newton Biles' daughter) would amend her returns of income for the 2004 and 2008 taxation years to account for her supposed 50% interest in 7 Austin Terrace.

[19] Whichever version is applicable, a senior official, Patricia Northey, decided to uphold the Proposal so long as it was in writing, signed by the appropriate individuals, and those individuals waived all appeal rights and recourse rights. Northey also wanted one agreement for Shirley Scott and one for the estate, both in accordance with an internal policy on audit agreements.

[20] The inconsistency on what the Proposal was also pervaded into the assumptions underlying the Proposal. The Respondent contended that the Proposal was dependent on establishing the facts as to the legal ownership of the Property, which turned out to be problematic. The Applicant submitted that all of the approvals for the Proposal were in place and the parties had concluded an agreement from which the Respondent is now attempting to renege.

[21] The differences in viewpoint are captured in the respective Memoranda of Fact and Law as set out below:

- The Respondent submitted that Ling was working under the mistaken understanding that the Applicant had disposed of its interest in the Property in 1998. Lori Scott subsequently investigated and realized that certain land registry transactions had not been appropriately recorded on tax returns, and therefore the draft Proposal did not accurately reflect the legal ownership of the Property. Lori Scott referred the matter for further review, and Julie Wong of the Estates and Trust section "conducted an in-depth review of the matter and recommended that no adjustments to the applicant's tax liabilities for the 2004 taxation year be

made" (Respondent's Memorandum at para 13). Wong found that the Applicant had an interest in the Property.

The ultimate decision maker, Northey, ultimately decided not to grant the Applicant's request.

- The Applicant submits that the Proposal had been made by the Audit Division and the Department of Justice had addressed inquiries on it. The Applicant further submits that Northey, the "delegated authority with the authority to make a decision on this matter", approved the Proposal with the above-noted conditions.

  The Applicant submits that the Minister has not produced an opinion of the Department of Justice of May 7, 2013, and that she "has adduced no basis for disregarding the advice of its counsel and has not denied that the advice confirmed the legality of the Proposal or conformity with the Act, which the Minister now purports to contest" (Applicant's T-1373-15 Memorandum at para 8). A letter accepting the Proposal, including waivers of objection and appeal rights, was prepared but not sent.

[22] Lori Scott of CRA found discrepancies in the chain of title of the Property. Wong of CRA investigated further, confirmed the discrepancies, and recommended that no adjustment be made to the estate's tax liabilities.

Northey ultimately agreed with that internal recommendation.

B. *Decision*

[23] As stated in the decision letter, the purpose of the reconsideration was a review of the decision to deny the request for adjustment to the 2004 tax return under s 152 (4.2) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA].

152 (4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining — at any time after the end of the normal reassessment period, of a taxpayer who is an individual (other than a trust) or a graduated rate estate, in respect of a taxation year — the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is 10 calendar years after the end of that taxation year,	**152 (4.2)** Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable — particulier (sauf une fiducie) ou succession assujettie à l'imposition à taux progressifs — pour une année d'imposition, le remboursement auquel le contribuable a droit à ce moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année en vertu de la présente partie, le ministre peut, si le contribuable demande pareille détermination au plus tard le jour qui suit de dix années civiles la fin de cette année d'imposition, à la fois :
(a) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; and	**a)** établir de nouvelles cotisations concernant l'impôt, les intérêts ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie;
(b) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 122.9(2), 127.1(1), 127.41(3)	**b)** déterminer de nouveau l'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 122.9(2), 127.1(1),

or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.	127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année ou qui est réputé, par le paragraphe 122.61(1), être un paiement en trop au titre des sommes dont le contribuable est redevable en vertu de la présente partie pour l'année.

[24] The decision letter described the Applicant's request as (a) to allow a loss carry back from 2008 to 2004 or (b) to adjust the proceeds of deemed disposition in 2004 to reflect the actual sale amount. Further, the request was characterized as a request to treat the October 23, 2008 letter as a Notice of Objection and a waiver of the normal three year reassessment period.

[25] The decision letter reached the following conclusions:

- The loss carry back was not approved because the disposition would have had to have been made within one year of the date of death or within three years of the capital gain. The disposition of the Property occurred four years after the death of Evelyn Biles.
- The adjustment to net proceeds of the deemed disposition of the Property in 2004 was denied because the FMV used in 2004 had been that of an appraiser requested by the estate, and no information (other than the 2008 disposition) had been provided to show that the 2004 value was overstated.
- The beneficial ownership of the Property was in fact 50/50 between Evelyn Biles and the estate until after the death of Evelyn Biles. Further, the 2004 taxable

capital gain had been understated, but the CRA would not adjust the 2004 tax year to increase the taxable income because it was statute barred.

- The request to treat the October 23, 2008 letter as a notice of objection was denied because the request for such treatment was made after the expiration of the time limit for filing Notices of Objection – one year after tax filing or 90 days after mailing the notice of assessment – and further there was insufficient information filed to show the Applicant could not have filed its Notice of Objection in a timely manner.
- The Proposal was inconsistent with the legislation and could not be implemented.

III. Analysis

[26] It is not the Court's intention to review all of the pertinent legislative provisions other than to note that (a) with respect to extensions of time to file notices of objection, s 166 (1) of the ITA gives the Tax Court jurisdiction to extend time in certain circumstances and (b) s 152 (4.2) of the ITA gives discretionary power to the Minister to reassess a taxpayer's return beyond the normal reassessment period, upon consent.

A. *Issues*

[27] The issues are:

1. Does this Court have jurisdiction in respect of decisions concerning Notices of Objection or applications for extensions of time to serve a Notice of Objection (i.e. the decision under s 166.1)?

2. Was the Minister's decision not to reassess the Applicant (under s 152 (4.2)) reasonable?

3. Can the Applicant seek an order in the nature of *mandamus* as set out in the T-1970-14 Application?

B. *Standard of Review*

[28] With respect to issues concerning the timeliness of Notices of Objection (i.e. s 166.1), a standard of review analysis is not necessary. As held in *ConocoPhillips Canada Resources Corp v Canada (National Revenue)*, 2014 FCA 297, 247 ACWS (3d) 717, leave to appeal to SCC refused, 36304 (October 8, 2015) [*ConocoPhillips*], these issues are not properly within this Court's jurisdiction.

[29] It should be noted that this decision was not before Justice Hughes when he referred matters back for reconsideration. Therefore, the Applicant's argument on this point, that the Respondent has not carried out the Hughes Order, is irrelevant.

[30] The Applicant says that because it cannot apply to the Tax Court it is entitled to come to this Court, particularly in respect of the Respondent's failure to exercise its discretion by virtue of fettering its discretion.

[31] I adopt Justice Mactavish's reasoning in *Gordon v Canada (Attorney General)*, 2016 FC 643, 267 ACWS (3d) 738, that fettering of discretion is a reviewable error *per se* and will result

in a decision being quashed. Justice Mactavish summarized the state of the law on this issue thus:

> [25] Some confusion exists regarding the appropriate standard of review where the fettering of discretion is at issue.
>
> [26] Traditionally, the fettering of discretion has been reviewable on the correctness standard: *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198 at para. 33, 366 N.R. 301.
>
> [27] However, the Federal Court of Appeal has recently posited that post-*Dunsmuir*, the fettering of discretion should be reviewed on the reasonableness standard, as it is a kind of substantive error. The Federal Court of Appeal has, however, also been careful to say that the fettering of discretion is always outside the range of possible, acceptable outcomes, and is therefore *per se* unreasonable: *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at paras. 23-25, 425 N.R. 341.
>
> [28] It is sufficient to state in this case that the fettering of discretion is a reviewable error under either standard of review, and will result in the decision being quashed: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250 at paras. 71-73, 450 N.R. 91; see also *Stemijon Investments*, above, at para. 23. Simply put, if the Minister's Delegate fettered her discretion, her decision should be set aside regardless of the standard of review applied.

[32] With respect to s 152 (4.2) matters, the standard of review has been held to be reasonableness (*Canada (Attorney General) v Abraham*, 2012 FCA 266, leave to appeal to SCC refused, 35141 (March 28, 2013)). That standard would be applicable to all but the issue of whether the Minister through CRA had reneged on an agreed upon Proposal. It would offend any notion of fairness to defer to the Minister's judgment as to whether he or she had made an agreement and reneged on it. Sitting in judgment of one's own actions raises all the concerns inherent in a challenge based on reasonable apprehension of bias. Therefore, on this issue, the Minister must be correct.

C. *Section 161.1*

[33] The Applicant attempts to avoid the limitations in s 161.1 and the jurisdiction of the Tax Court by recasting the matter as one of the exercise of discretion. In my view, that is an error. The matter is not one of discretion but of compliance with a strict scheme of Notice of Objection provisions established by Parliament. This is not some sort of gap in the tax system to be filled in by this Court.

[34] The fact that the Applicant cannot take advantage of the extension of time provisions is not a legal lacuna. The Applicant was out of time and it ran afoul of the specific provisions dealing with extensions of time for filing notices of objection. It cannot use the Federal Court as some form of back alley to avoid the provision and to avoid the jurisdiction of the Tax Court as confirmed in *ConocoPhillips*.

[35] To the extent that this Court has a small window of jurisdiction as per *ConocoPhillips Canada Resources Corp v Canada (National Revenue)*, 2016 FC 98, 262 ACWS (3d) 1087, in matters of bad faith and fettering discretion, those circumstances do not arise here.

[36] The Applicant, while admitting that the October 23 letter was out of time if considered as a Notice of Objection, contends that the Minister fettered her discretion or refused to exercise her discretion when she used the following phrase to justify not extending time: “there would have been no benefit to be gained in CRA considering an extension”. The Applicant argues that these

words show that the Minister considered that an extension of time is only justified if CRA benefits – as if this type of consideration is a one-way street.

[37] The Applicant mischaracterizes the Minister's words. Those words do not connote that there was no benefit to the Minister – it is difficult to see when any extension of time would benefit CRA. The words must be read in the context of the reference to the request being out of time and providing too little information. The phrase is nothing more than an acknowledgement that, given these deficiencies in the request, there was no point in CRA considering the request further.

[38] Therefore, the Minister did not fetter her discretion and the Minister cannot be found to have refused to make a decision, as was also claimed by the Applicant. In listing the reasons for denying the Applicant's request, the Minister confirmed that a decision had been made.

[39] Therefore, this Court cannot and ought not to grant the relief requested in respect of the extension of time. Further, the Respondent did carry out that which was ordered by Justice Hughes.

D. *Section 152 (4.2)*

[40] The issue is whether the decision not to reassess the Applicant was reasonable. In reality, it is an attack based upon CRA reneging on its agreement as set out in the Proposal.

[41] There are two further matters raised by the Applicant: (1) the Minister's refusal to adjust the deemed proceeds of disposition ($2.8 million) in the 2004 tax year to reflect the disposition amount of $2.25 million realized in 2008; and (2) the decision not to reassess in accordance with the Proposal.

[42] With respect to the refusal to adjust the deemed proceeds of disposition, it is incumbent on the Applicant to make out its case. In this instance, the $2.8 million was the Applicant's valuation, not CRA's. That value was based on a third party opinion.

[43] The Applicant, having claimed $2.8 million FMV, then failed to provide CRA with the full appraisal report. There was no basis for the CRA to go behind that value declared by the Applicant.

[44] The fact that four years later in 2008 the sale of the Property produced $2.25 million does not establish that the FMV was $2.25 million in 2004. Without more details it is difficult to see that it was unreasonable for the Minister to rely on the Applicant's own valuation.

[45] With respect to "reneging" on the Proposal, before addressing whether *mandamus* is an available remedy and whether such relief should contain specific directions, the Applicant must establish that there was an accepted Proposal.

[46] As discussed earlier, even now the parties are not "*ad idem*" as to the Proposal and its basis. It is evident that Lori Scott saw problems with the chain of title. The Proposal emanated

from the recognition that there was an auditor error that in 1998 the Trust had disposed of its interest in the Property. Establishing the real facts as to the chain of title was a necessary precondition to implementing the Proposal. The problem of what interest the Trust had in the Property in 1998 and in 2004 was addressed earlier in these Reasons.

[47] Therefore, absent an agreement as to the chain of title not only were the parties not in agreement about the Proposal, but the Proposal could not be legally implemented. A reassessment cannot be made contrary to law.

[48] CRA's understanding of the chain of title developed over time as it was reviewing the matter. It can be summarized as follows:

- Prior to the Proposal being made, the documents show that the CRA was alive to the issue of what portion of the Property was transferred to Shirley Scott. On March 23, 2013, the notes indicate that the documents provided by counsel did not answer the question of "which 50% interest was transferred to Shirley in 1998, from the Trust or the mom's portion?"
- The CRA initially concluded that the spousal trust had transferred its ownership to Shirley Scott in 1998, so that the Property was owned 50% by Shirley Scott and 50% by Evelyn Biles. The CRA notes that this transfer in 1998 would have required the spousal trust to file a deemed disposition and report capital gains or losses; however, no such filing was recorded.

- However, some new facts came to light at this point. For example, the CRA investigated and found that in 2006 the legal title to the Property was changed to the Estate of Newton D. Biles and Paul Biles. Further, Paul Biles indicated to the CRA that the 1998 change in title was to avoid probate on Evelyn Biles' will.
- Ultimately, the CRA concluded that there was no disposition of the spousal trust property in 1998; rather, the transfer in 1998 was limited to the 50% interest held by Evelyn Biles, and "[t]he transfer of Evelyn Biles' 50% interest in 1998 was a method used by Evelyn Biles and the beneficiaries to avoid Ontario probate tax".

[49] Therefore, in my view, there was no agreed upon Proposal such that the Applicant can ground a complaint that the Minister reneged on the Proposal.

Even if there was an agreement it was subject to confirmation of facts and legality, conditions which were not fulfilled.

[50] To the extent that there was a decision not to proceed with the Proposal, as an exercise of discretion the Minister's refusal to do so was reasonable.

[51] Given that there is no basis for judicial review, matters of a directed order are irrelevant.

IV. Conclusion

[52] For all these reasons, the judicial reviews are dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the applications for judicial review are dismissed with costs.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-1970-14 AND T-1373-15
STYLE OF CAUSE:	ESTATE OF NEWTON D. BILES v THE MINISTER OF NATIONAL REVENUE
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