Federal Court  Cour fédérale

Date: 20190227

Docket: T-88-18

Citation: 2019 FC 239

Ottawa, Ontario, February 27, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

REVERA LONG TERM CARE INC.

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] From 2007 until 2013, Revera Long Term Care Inc. (the "Applicant") over-reported its income by approximately $9 million dollars each year. The Applicant asked the Minister of National Revenue (the "Minister") to reassess its taxes under section 152(4)(a)(i) of the *Income Tax Act*, RSC, 1985 c 1 (5th Supp) ("ITA"), arguing the error was due to negligence. However, the Minister decided that she does not have discretion under section 152(4)(a)(i) in situations

where the taxpayer's negligence leads to over-reported income. The Applicant applied for judicial review of this decision and I will set it aside for the reasons that follow.

II. **Background**

[2] The Applicant, Revera Long Term Care Inc., is a taxable entity that operates nursing homes, retirement homes, and acute care facilities. The Applicant is owned by Revera Inc. and Retirement Residences Real Estate Investment Trust. In turn, Revera Inc. is owned by the Public Sector Pension Investment Board, and is a tax exempt federal corporation under section 149(1)(d) of the ITA.

[3] Around the year 1999, the Ontario and Alberta provincial governments began to annually provide grants to Revera Inc. as part of their respective policies to fund the construction costs of long term care facilities. Due to the way Revera Inc. structured its affairs, the Applicant received the government grants on behalf of Revera Inc. This did not change the fact that Revera Inc. should have reported the government grants when filing its taxes. However, the grants were incorrectly reported in the Applicant's taxable income instead of being reported by Revera Inc. As a result, the Applicant had been over-paying tax.

[4] In a letter dated December 21, 2015, the Applicant advised their Large Business Case Manager ("LBC Manager") with the Audit Division of the Canada Revenue Agency ("CRA") of the error. On June 16, 2016, the Applicant's legal counsel provided further information to the CRA, including a letter describing how the reporting error occurred. Their evidence was that the reporting error was first made in 2007: "due solely to the carelessness of the taxpayer and neglect of those preparing and reviewing such financial statements, material misrepresentations of taxation information contained in [the Applicant's] tax returns for the 2007-2010 taxation years

has occurred." The parties engaged in discussions and, eventually, solutions were found for all years except the 2009 and 2010 taxation years. For example, for its 2011, 2012, and 2013 taxation years the Applicant filed waivers, thus statutorily allowing the Minister to make the adjustments. As for 2008, the CRA was able to adjust the loss balance without issuing a Notice of Reassessment because a loss was reported.

[5] In regards to the 2009 and 2010 taxation years, the parties disagreed over the approach. For these years, the time within which the Applicant could file waivers had already expired. In addition, the normal period of time to request a reassessment had also expired. Specifically, under sections 152(3.1)(a) and (b) of the ITA, a taxpayer has three or four years to request a reassessment. But the ITA provides exceptions. For example, section 152(4)(a)(i) allows the Minister to exercise discretion to reassess tax years outside the normal period as long as the error is due to a misrepresentation attributable to neglect, carelessness, or wilful default:

Assessment and reassessment (4) The Minister may at any time make an assessment, reassessment or additional assessment of tax for a taxation year, interest or penalties, if any, payable under this Part by a taxpayer or notify in writing any person by whom a return of income for a taxation year has been filed that no tax is payable for the year, except that an assessment, reassessment or additional assessment may be made after the taxpayer's normal reassessment period in respect of the year only if (a) the taxpayer or person filing the return	Cotisation et nouvelle cotisation (4) Le ministre peut établir une cotisation, une nouvelle cotisation ou une cotisation supplémentaire concernant l'impôt pour une année d'imposition, ainsi que les intérêts ou les pénalités, qui sont payables par un contribuable en vertu de la présente partie ou donner avis par écrit qu'aucun impôt n'est payable pour l'année à toute personne qui a produit une déclaration de revenu pour une année d'imposition. Pareille cotisation ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable

(i) has made any misrepresentation that is attributable to neglect, carelessness or wilful default or has committed any fraud in filing the return or in supplying any information under this Act, or	pour l'année que dans les cas suivants : a) le contribuable ou la personne produisant la déclaration : (i) soit a fait une présentation erronée des faits, par négligence, inattention ou omission volontaire, ou a commis quelque fraude en produisant la déclaration ou en fournissant quelque renseignement sous le régime de la présente loi,

[6] During a telephone call discussion between the parties on November 8, 2016, counsel for the Applicant advised its position is that the statute barred years could be opened to adjust the reporting error on the basis of the accountant's gross negligence. However, the CRA's view, as described in the LBC Manager's affidavit, is that section 152(4)(a)(i) cannot be applied for the taxpayers benefit. An audit within the Certified Tribunal Record ("CTR"), demonstrates that in reaching this conclusion the LBC Manager contacted the CRA's Legislative Applications Section for an opinion about the applicability of section 152(4)(a)(i) to the Applicant's reporting error:

> As the taxpayer had requested adjustments to multiple statute barred years (2007-2010), the proper course of action had to be determined as to whether these adjustments should be processed. A technical assistance referral was prepared and sent to the Legislative Applications Section (LAS) to obtain their opinion as to whether it is open to the CRA to reassess an otherwise statute-barred year at the taxpayer's request pursuant to subparagraph 152(4)(a)(i) of the Act where the taxpayer declares they were negligent in their preparation of their returns.

[7] On January 19, 2017, the requested opinion was provided by a CRA officer with the Legislation Application Section (the "LAS Officer"). According to the LAS Officer, the

provision is at the Minister's discretion, and could not be interpreted to apply to the statute barred years. The opinion is also signed by the Manager of the Legislative Application Section. The relevant analysis is as follows :

> Subsection 152(4) provides the situations under which the Minister may reassess a return of income. It is not intended to allow the taxpayer to extend the normal reassessment period at their discretion for the purposes of making a taxpayer request to an otherwise statute-barred year. Therefore, we concur with your view that subparagraph 152(4)(a)(i) is intended to apply in situations in which the Minister finds the taxpayer has made a misrepresentation that is attributable to neglect, carelessness, or wilful default, etc. in the preparation of their tax return. It is not intended to be utilized by a taxpayer to circumvent statute-barred dates. The application of subsection 152(4) of the Act is at the Minister's discretion, and, in our view, such interpretation would not only be a misapplication of the provision but would also render subsection 152(3.1) and subparagraph 152(4)(a)(ii) meaningless. Therefore, it is our view that subparagraph 152(4)(a)(i) may not be applied to reassess for taxpayer requested adjustments in statute-barred years as the taxpayer has suggested.
>
> [Emphasis in original.]

[8] Also according to the LBC Manager's affidavit, the parties discussed the CRA's position in a telephone call on February 22, 2017 as follows:

> section 152(4) of the *Income Tax Act*, which allows the Minister of National Revenue to look at years beyond the normal reassessment period where the taxpayer has made a misrepresentation that is attributable to neglect, carelessness or wilful default, was not meant to be applied to allow negligent taxpayers to make adjustments to statute-barred years. I also told him that LAS supported this conclusion.

[9] On October 19, 2017 the LBC Manager contacted the Applicant and advised that its 2007, 2008, 2011, 2012, and 2013 tax years would be reassessed. However, since the 2009 and 2010 taxation years were statute barred, they would not be reassessed.

[10] On December 26, 2017 a CRA Large File Auditor wrote a review of the Adjustment Request stating that:

> The taxpayer's requested adjustments for 2009 and 2010 were not approved because the taxpayer had reported taxable income for each of those years so if the requested adjustments had been processed, a Notice of Reassessment would have to be issued. As these years are both statute barred and there are no waivers in place for those years we are unable to issue a Notice of Reassessment for 2009 or 2010.

[11] On December 19, 2017 the CRA Large File Auditor formally wrote to the Applicant and notified it that the CRA would not process adjustments to revenue reported for the 2009 and 2010 taxation years. On January 16, 2018 the Applicant filed for judicial review of this decision.

III. **Preliminary Issue**

[12] The Respondent raises a preliminary issue, arguing that this Court does not have jurisdiction to hear this matter. According to the Respondent, the issue raised in this matter is a dispute over an assessment of tax—a matter that is appealable to the Tax Court of Canada (the "TCC"). According to section 18.5 of the *Federal Courts Act*, RSC 1985 c f-7, matters appealable to the TCC are outside of the Federal Court's jurisdiction. Therefore, the Respondent argues that this application for judicial review is outside of the Federal Court's jurisdiction.

[13] I disagree because the issue in this matter is whether the Minister reasonably decided that no discretion exists under section 152(4)(a)(i) to reassess the Applicant's 2009 and 2010 tax years. This refusal to reassess tax is not appealable to the TCC (*Abakhan & Associates Inc v Canada (Attorney General)*, 2007 FC 1327 [*Abakhan*]). Therefore, section 18.5 of the *Federal Courts Act* is not engaged, and the matter is within the Federal Court's jurisdiction.

IV. **Issue and Standard of Review**

[14] The sole issue in this decision is whether the Minister reasonably decided that she does not have the legal authority to reassess the Applicant's 2009 and 2010 tax years. This is an issue that involves the Minister's interpretation of her enabling statute. When reviewing such decisions, the standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54 [*Dunsmuir*]; *Bonnybrook Industrial Park Development Co Ltd v Canada (National Revenue)*, 2018 FCA 136 [*Bonnybrook*]).

V. **Analysis**

A. *Did the Minister reasonably decide she does not have legal authority to reassess the Applicant's 2009 and 2010 tax years?*

[15] The Applicant argues that section 152(4)(a)(i) of the ITA allows the Minister to correct any mistake that is the result of neglect or carelessness, even if correcting the mistake benefits the taxpayer or the mistake is brought forward by the taxpayer. Therefore, the Applicant argues that the Minster's interpretation of the section wrongly restricts reassessments to those who underreported income and owe tax. And as such, the Applicant argues the Minister narrowed the discretion available in section 152(4)(a)(i) contrary to its ordinary meaning, unqualified language, and purpose.

[16] The Applicant's argument points out that the statutory text does not qualify who the Minister may reassess under 152(4)(a)(i), and provides an example of language that Parliament *could* have used if its intent was to restrict 152(4)(a)(i) to those who underreported income:

> The Minister may at any time make a reassessment of tax, except that a reassessment <u>of additional tax</u> may be made after the taxpayer's normal reassessment period only if the taxpayer has

made any misrepresentation that is attributable to neglect or carelessness in filing the return.

[Underlined text added by the Applicant.]

[17] The Applicant also relies on other sections in the ITA where Parliament expressly limited their application to certain taxpayers. For example, section 152(4.01)(a) expressly limits its application to taxpayers who made misrepresentations or submitted a waiver:

Extended period of assessment	Période de cotisation prolongée
(4.01) Notwithstanding subsections (4) and (5), an assessment, reassessment or additional assessment to which paragraph (4)(a), (b), (b.1), (b.3), (b.4) or (c) applies in respect of a taxpayer for a taxation year may be made after the taxpayer's normal reassessment period in respect of the year to the extent that, but only to the extent that, it can reasonably be regarded as relating to,	(4.01) Malgré les paragraphes (4) et (5), la cotisation, la nouvelle cotisation ou la cotisation supplémentaire à laquelle s'appliquent les alinéas (4)a), b), b.1), b.3), b.4) ou c) relativement à un contribuable pour une année d'imposition ne peut être établie après l'expiration de la période normale de nouvelle cotisation applicable au contribuable pour l'année que dans la mesure où il est raisonnable de considérer qu'elle se rapporte à l'un des éléments suivants :
(a) where paragraph 152(4)(a) applies to the assessment, reassessment or additional assessment,	a) en cas d'application de l'alinéa (4)a):
(i) any misrepresentation made by the taxpayer or a person who filed the taxpayer's return of income for the year that is attributable to neglect, carelessness or wilful default or any fraud committed by the taxpayer or that person in filing the return or supplying any information under this Act, or	(i) une présentation erronée des faits par le contribuable ou par la personne ayant produit la déclaration de revenu de celui-ci pour l'année, effectuée par négligence, inattention ou omission volontaire ou attribuable à quelque fraude commise par le contribuable ou cette personne lors de la production de la déclaration ou de la communication de
(ii) a matter specified in a waiver filed with the Minister in respect of the year;	

quelque renseignement sous le régime de la présente loi,

(ii) une question précisée dans une renonciation présentée au ministre pour l'année;

[18] The Applicant also argued that the purpose of 152(4)(a)(i) is to allow the Minister to reassess a taxpayer "as he or she should have been if not for the misrepresentation" (*Aridi v The Queen*, 2013 TCC 74 at para 31). The Applicant submits this purpose encompasses those taxpayers who both underreported and over-reported income.

[19] The Respondent argues that the decision was reasonable, and that the Court should give deference to "the Minister's interpretation of the purpose of subparagraph 152(4)(a)(i), as set out in [the LAS Officer's memorandum]." According to the Respondent, the Minister interpreted the statute by taking into account "the provision both in isolation and in harmony with the scheme of the Act as a whole." The Respondent also submits that the legislation does not need to exclude every possible scenario, and that no reported decision of any court supports the Applicant's interpretation. The Respondent says that the fact the burden of proof is on the Minister is further evidence to support the Minister's lack of discretion.

[20] I will begin by pointing out that the Supreme Court of Canada has explained that the scope of the Minister's discretion is determined by conducting a "textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole" (*Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10). In this case, there is nothing to indicate any textual, contextual, or purposive analysis of the provision occurred. First, the

information in the decision letter is only that the Applicant's request to use section 152(4)(i)(a) could not happen:

> Your request(s) for adjustments of Income Tax Returns previously filed have been reviewed. We have determined that the following request(s) could not be processed:
>
> ● *Adjustments to revenue reported for the 2009 and 2010 taxation years*
>
> [Italics in original.]

[21] At the judicial review hearing, counsel for the Respondent argued that the Minister has no duty to release reasons to the taxpayer. The Respondent's submissions were that a challenge to the assessment would go before the Tax Court of Canada, and the Tax Court of Canada would interpret the provision. Thus, the Respondent argued that the Minister's reasons do not matter in such circumstances.

[22] While counsel was concerned with what happens when there is a dispute over the assessment of tax, this Court's concern is the existence of justification, transparency, and intelligibility within the decision making process (*Dunsmuir* at para 47). The Minister's exercise of discretion is not isolated from judicial review, and in circumstances where the decision cannot be understood on its own, the Court turns to the record for the reasons (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 37). Upon my review of the CTR, the LAS Officer's opinion letter is the only source of reasons for this decision. Indeed, it is the only source cited by the Respondent on this judicial review, and is reproduced below:

> OUR COMMENTS
>
> Subsection 152(4) provides the situations under which the Minister <u>may</u> reassess a return of income. It is not intended to allow the taxpayer to extend the normal reassessment period at their discretion for the purposes of making a taxpayer request to an

> otherwise statute-barred year. Therefore, we concur with your view that subparagraph 152(4)(a)(i) is intended to apply in situations in which the Minister finds the taxpayer has made a misrepresentation that is attributable to neglect, carelessness, or wilful default, etc. in the preparation of their tax return. It is not intended to be utilized by a taxpayer to circumvent statute-barred dates. The application of subsection 152(4) of the Act is at the Minister's discretion, and, in our view, such interpretation would not only be a misapplication of the provision but would also render subsection 152(3.1) and subparagraph 152(4)(a)(ii) meaningless. Therefore, it is our view that subparagraph 152(4)(a)(i) may not be applied to reassess for taxpayer requested adjustments in statute-barred years as the taxpayer has suggested.
>
> [Emphasis in original.]

[23] Although the Supreme Court of Canada has explained that a textual, contextual and purposive analysis is required, the LAS Officer's opinion letter lacks any real analysis of whether the Minister's scope of discretion included the legal authority to reassess the statute barred years. The opinion letter begins by stating that the scope of the Minister's discretion under section 152(4)(a)(i) is limited to circumstances where a taxpayer underreported taxable income. There are two reasons provided for this conclusion, and both are conclusory. The first reason provided is that Parliament did not intend to allow taxpayers to circumvent statute-barred dates. This statement did not analyse whether the exception to statute barred dates in section 152(4)(a)(i) could be applied. To be clear, the Applicant is requesting relief from the limitation period. So failing to analysis whether the exception to the limitation period applies is an inadequate analysis.

[24] The second reason provided is that allowing the Minister to reassess the statute barred years would render sections 152(3.1) [Definition of normal reassessment period] and 152(4)(a)(ii) [waiver] of the ITA meaningless. This is conclusory and suggests that the exception to the statute barred dates does not apply in this matter because the years are statute barred.

There is no explanation or analysis provided about why the LAS Officer believed sections 152(3.1) and 152(4)(a)(ii) would become meaningless.

[25] In light of the conclusory analysis which does not conduct any textual, contextual, and purposive analysis as the Supreme Court of Canada requires, I agree with the Applicant that the decision is unreasonable. Contrary to the Respondent's submissions, the LAS Officer's opinion letter cannot be said to take into account the provision in isolation nor in harmony with the scheme of the ITA. While the LAS Officer writes that the intent is not to circumvent statute-barred dates and that a reassessment would render sections 152(3.1) and 152(4)(a)(ii) meaningless, there is no consideration about the exception to statute barred dates and whether it applies in this case. The Respondent argues that the LAS Officer's opinion letter is a source of reasons to support the Minister's decision, however, it does not allow me to conclude that the Minister conducted a textual, contextual, and purposive analysis as she is required to do when performing legislative interpretation. Nothing in the CTR indicates any other reasons, and accordingly I find that the Minister failed to reach a reasonable decision.

[26] The Applicant raised a further argument that this Court should exercise its discretion to interpret the provision and provide guidance for the Minister. The Applicant relied on *Bonnybrook* at paragraph 33, which involved an interpretation of ITA section 220(3). On the facts of that case, the Federal Court of Appeal held that it was appropriate to "decide the appeal with respect to subsection 220(3) by taking into consideration the Minister's arguments presented at the hearing."

[27] On the facts of the case before me, both parties offered alternative interpretations of the provision. However, the Respondent did so in the context of its objection to the Applicant's

request for *mandamus*, and I have decided this matter on the reasonableness issue alone. Furthermore, neither party commented on this Court's previous consideration of this issue in *Abakhan*:

> [9] Further, I cannot conclude that Abakhan's application for judicial review runs contrary to Parliament's intent to confine late requests for reassessments to individuals. I very much doubt that Parliament turned its mind to the circumstances before me – where a corporate taxpayer requests a reassessment of its tax liability on the grounds that it exaggerated its own taxable income. There appears to be nothing preventing a company from making such a request and nothing standing in the way of an application for judicial review if the Minister refuses.

[28] Since the circumstances of this matter are unlike *Bonnybrook*, I do not find that this is an appropriate case for the Court to undergo an interpretation for the Minister.

VI. Disposition

[29] I will set aside the Minister's decision, and return it for redetermination. Each party will bear its own costs.

JUDGMENT in T-88-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is referred back for redetermination.
2. There shall be no costs.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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