Federal Court  Cour fédérale

Date: 20190321

Docket: T-130-19

Citation: 2019 FC 348

Ottawa, Ontario, March 21, 2019

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

SAM PRINCE

Applicant

and

MINISTER OF NATIONAL REVENUE AND THE CANADA REVENUE AGENCY

Respondents

JUDGMENT AND REASONS

(Delivered orally from the Bench in Montréal, Quebec on January 31, 2019 in support of the Court's decision dismissing the application with costs)

I. Introduction

[1] This is an application for judicial review of an alleged decision dated December 17, 2018 by an officer [the Officer] of the Canada Revenue Agency [CRA] seeking a provisional interlocutory permanent injunction and other declaratory relief with the view to quashing and

enjoining the Minister or the CRA from proceeding to implement proposed reassessments of the Applicant for the taxation years 2007 to 2016 pursuant to subsection 152(4) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA].

[2] On January 17, 2019, the Applicant proceeded with an urgent motion to obtain interlocutory relief. A subsequent telephone case conference with the parties was held on January 18, 2019.

[3] On January 22, 2019, the Chief Justice issued an order that the matter should proceed directly with an expeditious hearing of the underlying application for judicial review to be heard on January 31, 2019, this day, accompanied by incidental procedural orders.

[4] The orders were granted based upon the undertaking by the Respondent not to issue the Notice of Reassessment until the hearing of the underlying application.

II. Background Facts

[5] On April 8, 2015, the Officer acting on behalf of the Minister of National Revenue (Minister), contacted Mr. Prince regarding the commencement of an audit.

[6] On September 1, 2015, the Officer served a requirement for information on Mr. Prince, which included the request to complete a detailed questionnaire about his assets inside and outside Canada, and provide all bank statements for the period of 2009 to 2014 for accounts held in Israel and the United States of America.

[7] On June 20, 2017, after the Officer filed an application under section 231.7 of the ITA to force Mr. Prince to disclose the information required, she informed Mr. Prince that she would withdraw the requirement because she had requested and obtained information from third parties, both domestic and international, given his absence of cooperation. The Officer discontinued the application to obtain information on November 16, 2017. Mr. Prince considers the audit was completed and final at that time, which the Officer says was not the case.

[8] On June 22, 2017, the Officer informed Mr. Prince in writing of the proposed reassessments for the taxation years 2005 to 2014.

[9] Subsection 152(4) of the ITA provides that "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 …".

[10] While Mr. Prince considers that the audit was completed and final at that time, this was not the case. The Officer had granted Mr. Prince thirty (30) days to submit additional information or representations before the completion of the reassessments. As requested by Mr. Prince, further extensions to provide representations were provided in excess of the thirty (30) days already granted.

[11] Prior to the issuance of the reassessments, which had been delayed awaiting representations from Mr. Prince, counsel for Mr. Prince filed a no-name application in the Voluntary Disclosure Program [VDP] on July 6, 2017. On or about October 2017, the Officer

learned of the Mr. Prince's voluntary disclosure under the VDP. The information provided by the Mr. Prince in accordance with the VDP was considered by the Officer in the further reassessment that took place.

[12] Mr. Prince objected to the reassessments on or around March 29, 2018.

[13] Under the VDP, which takes its authority from subsection 220(3.1) of the ITA, the Minister may relieve a taxpayer of penalties, refrain from prosecuting him and relieve him partially of interest provided that he meets four basic conditions. The application must: (1) be voluntary; (2) complete; (3) involve the application of a penalty; and (4) disclose information that is at least one year past due (Information Circular IC00–1R5 at paras 31-42, since replaced).

[14] On June 26, 2018, the Officer found that Mr. Prince's VDP application was not voluntary and was therefore dismissed from the program. The Officer relied on the fact that at the time of the no-name application, which sets the effective date of disclosure (Information Circular IC00–1R5 at para 50), an audit had been ongoing since April 2, 2015; that the audit was not completed, as the auditor was still waiting for Mr. Prince's additional information or representations; and that the information disclosed in the course of the VDP was relevant to the ongoing audit. Thereafter, she informed Mr. Prince that all information disclosed in the course of the VDP application had been transmitted to the auditor.

[15] As provided by paragraph 57 of the Information Circular IC00–1R5, Mr. Prince requested an internal review of the Minister's decision on July 19, 2018 (second-level application review).

[16] On August 20, 2018, the Officer informed Mr. Prince that his income tax returns for the taxation years 2007 to 2016 had been selected for a second audit and requested additional information (affidavit of Audrey Beaudoin at para 28, Exhibit "K"). Eight (8) days later, counsel for Mr. Prince objected in writing to the second audit, the request for information was premature given the pending decision on the second-level VDP review.

[17] Mr. Prince contends that the information supplied as a result of his voluntary disclosure was used by the Respondent in the second audit, when it was provided ostensibly on a voluntary basis and should not have been subject to being included in the assessment.

[18] The Officer is of a different view. She continued the audit and sent Mr. Prince a detailed proposed reassessment on December 17, 2018. She granted him until January 18, 2019 to provide additional information and representations. The Applicant did not provide any submissions in response to the December 17, 2018 letter. She has yet to reassess Mr. Prince and to decide the second-level VDP application review.

III. Points in Issue

A. *First, is a fairness letter [fairness letter] providing the Applicant time to provide submissions regarding the Minister's intention to reassess to prevent the Minister from reassessing Mr. Prince while the decision related to a second level administrative VDP application review is pending a decision within the meaning of section 18?*

B. *Second, is the Minister legally barred from reassessing Mr. Prince while the second level administrative VDP application review is pending?*

IV. Standard of Review

[19] The parties made no submissions on the standard of review. The issue concerning whether the fairness letter of the Officer is a reviewable decision, although relating to the jurisdiction of the Court, in this particular circumstance, is essentially one of determining a jurisdictional fact as to whether the evidence demonstrates that a decision to reassess has been made. It should be reviewed on a standard of reasonableness.

[20] Alternatively, the decision to issue a letter indicating an intention to reassess should be reviewed on a highly deferential standard of reasonableness. The term "may" appears to be unrestricted. I was not made aware of any regulatory or other policy guidelines that would restrict the Minister's authority to at any time make an assessment. To the extent, therefore, that the discretionary power is reviewable, it would be reviewed on a very highly deferential standard of reasonableness.

V. Analysis

(1) Jurisdictional Fact Issue

[21] I conclude that I do not have the jurisdiction to review the letter of the Officer dated December 17, 2018, as it is not evidence of a "decision" within the meaning of subsection

18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7 [FCA] necessary for the Court to assume jurisdiction.

[22] The letter is essentially a fairness letter providing Mr. Prince with an opportunity to provide submissions why the reassessment should not be made. To date the reassessment has not been made.

[23] Mr. Prince argues that his position with respect to any submission he would make regarding the voluntary disclosure was known. Nevertheless, I am not in a position to conclude that the letter of December 17, 2018 was representative of a decision within the meaning of the FCA when it indicated on the face of its wording that it would consider the Applicant's further submissions and provided time to the Applicant to do so. Moreover, it has still not reassessed Mr. Prince.

[24] In the alternative, the Respondent argues that if the letter of December 17, 2018 was, in effect, a decision that the CRA was reassessing the Applicant, then the Federal Court would be denied jurisdiction by the effect of section 18.5 of the FCA due to the availability of an appeal of the decision. I agree. Either way, I do not have jurisdiction.

[25] Moreover, with respect to the second issue, if I have misapprehended the restrictions regarding my jurisdiction, I nevertheless would not issue an order quashing the letter of December 17, 2018, or granting the other requested relief to the same effect pending the completion of the second-level VDP process.

[26] I would not exercise my discretion, which would apply in the circumstances of these judicial review proceedings, because I do not see any prejudice to the Applicant if the reassessments are made prior to the pending decision of the VDP application, which is estimated to be made within two months or so.

[27] I add that the timing of a decision with respect to a voluntary disclosure would not likely play any role in any event unless some clear prejudice could be ascribed as resulting from the reassessments.

[28] In regard to the prejudice alleged by the Applicant were the reassessments to proceed in advance of the decision on his VDP application, the Respondent directed the Court to the evidence from a deponent, Mr. Ducharme, in an affidavit dated January 25, 2019, particularly at paragraphs 13 and 16:

> [13] Although a reassessment and a decision on an initial VD Application may be made almost simultaneously, it is our practice when an audit is underway. That [*sic*] VDP officers will wait for the audit to be completed before making a decision. VDP officers can thus benefit from the information gathered by the auditor.
>
> …
>
> [16] In the event that a VD Application is granted, after a reassessment was made, the Agency will issue a new notice of reassessment, taking into account the reduction of penalties and interests, if any.

[29] The Court is drawn to paragraph 16, which would appear to apply specifically to the circumstances in this matter. Mr. Ducharme indicates that even if the VDP application was

granted after the assessment was made, the CRA would issue a new reassessment taking into account its decision.

[30] I am also in agreement with the submission by the Respondent that if the Minister grants Mr. Prince's second-level VDP application review, she will not charge him penalties and will not prosecute him. She may also partially relieve him of interest (Circular IC00–1R5 at paras 11, 13). Nothing in the ITA or in the Circular prevents the Minister from granting such relief where the Minister has reassessed a taxpayer in the course of a regular audit. Furthermore, and if necessary for the implementation of the decision on the second-level review, the Minister may reassess notwithstanding subsections 152(4) and (5) along with subsection 220(3.1) of the ITA. Mr. Prince would not lose the benefits of a favourable decision on the second-level review even if made before reassessments are issued.

[31] Mr. Prince could not point to any statutory provisions that contradict this evidence. His arguments were based upon legal constructs such as promissory estoppel, contract, and breach of constitutional rights, none of which I find would have application in the circumstances.

[32] Accordingly, the application is dismissed with costs.

[33] If the parties are unable to agree on costs, they should file short submissions.

JUDGMENT in T-130-19

THIS COURT'S JUDGMENT is that the application is dismissed with costs.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-130-19
STYLE OF CAUSE:	SAM PRINCE v MINISTER OF NATIONAL REVENUE ET AL
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JANUARY 31, 2019
JUDGMENT AND REASONS:	ANNIS J.
DATED:	MARCH 21, 2019

APPEARANCES:

Barry Landy	FOR THE APPLICANT
Ian Demers	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Spiegel Sohmer Inc. Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENTS