Federal Court  Cour fédérale

Date: 20190528

Dockets: T-505-17

Citation: 2019 FC 750

Ottawa, Ontario, May 28, 2019

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ROGER GEORGES ABOU-RACHED

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mr. Roger Georges Abou-Rached, seeks judicial review of a decision dated February 23, 2017, rendered by Mr. Alan Jones, acting as delegate of the Minister of National Revenue [Minister], in which he denied the applicant's second administrative review of two T1 adjustment requests to reduce his previously reported business income and total income respectively for the taxation years of 2002 to 2004 and 2005 to 2007.

[2] On April 28, 2010 and April 19, 2011 respectively, the applicant filed requests for adjustments for the Minister to correct his net business income to the amount of $8500 for each taxation year (2002 to 2007). In these requests, the applicant submitted that his former accountants overstated his business income. Moreover, he only became aware of this mistake in September 2009 when he received a telephone call from a collection officer of the Canada Revenue Agency [CRA] informing him that he owed about $50,000 in tax arrears. If the requested adjustments were accepted, the applicant's net business income for 2002 to 2007 would be reduced by $139,500. The Income Tax Audit Division of the Vancouver Island Tax Services Office of the CRA handled the applicant's requests for adjustments.

[3] Given that the requests for adjustments were received beyond the three-year normal reassessment period provided under subsection 152(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [Act], they fall under the taxpayer relief provisions, namely subsection 152(4.2) of the Act.

[4] The information circular IC07-1 "Taxpayer Relief Provisions" [Guidelines] outlines the procedure that the CRA follows in exercising its discretion on behalf of the Minister to determine if relief is warranted. This can be a two-step process. If a request is denied or partly granted, there is no right of objection for a taxpayer to dispute a decision under the taxpayer provisions. However, if the taxpayer believes that the Minister did not properly exercise its discretion, the taxpayer can write to ask that the director of the tax services office or the tax centre reconsider the original decision and review the situation. During the second review, the taxpayer will have the opportunity to submit further representations for the CRA's consideration.

If the taxpayer believes that the Minister committed a reviewable error in exercising its discretion, the taxpayer can apply for judicial review of that decision.

[5] This is the second judicial review in this matter. The applicant applied for judicial review of an earlier negative decision rendered on December 16, 2014, by Mr. Clive Wheatley – one of the two CRA auditors previously treating the requests for adjustments. The technical problem, however, was that Mr. Wheatley did not have the required delegated ministerial authority to render a final decision under the taxpayer relief provisions. On October 20, 2016, this Court thus granted that application for judicial review, by consent, in an unreported decision (file T-90-15). On February 1, 2017, the applicant's file was remitted to another auditor, Ms. Cynthia Pacheco, for consideration as a second-level request for taxpayer relief.

[6] In the course of her assessment, Ms. Pacheco reviewed the entire audit file, including documents that the applicant had previously submitted, working papers prepared by Mr. Wheatley and Ms. Winnie Lin (née Leung, the CRA auditor involved in the file until late 2011). On February 8, 2017, Ms. Pacheco drafted her report and ultimately recommended that the Minister deny the requests for adjustments. Indeed, Mr. Jones, Team Leader of the Audit Division in the Vancouver Island Tax Services Office of the CRA [Delegate], approved Ms. Pacheco's recommendation and dismissed the requests for adjustments, leading to the application for judicial review currently before this Court.

[7] Given that the ministerial decision under the taxpayer relief provisions is discretionary, the Delegate's refusal to grant the requested adjustments shall be reviewed on a reasonableness

standard (*Anthony v Canada (National Revenue)*, 2016 FC 955 at para 22; *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 96), while any alleged breach of procedural fairness is reviewable on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at paras 43 [*Khosa*]).

[8] I have considered the legality or reasonableness of the Delegate's decision in light of all relevant documentation on file, including the certified tribunal record [CTR], the applicant's affidavit dated May 5, 2017, the affidavits of both Ms. Pacheco and Mr. Jones, dated May 25, 2017, the transcripts of their cross-examinations, as well as the parties' written and oral arguments. For the following reasons, this application must fail.

[9] First, based on the evidence in the record, I am satisfied that the Minister conducted a fresh and an independent redetermination of the requested adjustments. The allegations of bad faith on the part of the auditor or the Delegate are unsubstantiated and speculative. The process leading to the Delegate's final decision was both transparent and fair. During the cross-examination, the applicant notably asked both Ms. Pacheco and Mr. Jones how much time they spent reviewing his audit file before rendering the impugned decision. Apparently, Ms. Pacheco spent 34 hours reviewing his file, while Mr. Jones spent four hours reviewing the decision before approving Ms. Pacheco's recommendation. In the applicant's view, this amount of time was "unacceptably low" and demonstrates that Mr. Jones "rubber stamped" Ms. Pacheco's recommendation. I must disagree with the applicant. Ms. Pacheco and Mr. Jones were not required to "re-audit" the applicant or request additional information from him, especially given that his own evidence demonstrated that his income exceeded the $8500 annual income he

claimed. There is no evidence that the Delegate acted improperly in endorsing the auditor's recommendation. In this regard, the applicant has failed to establish any breach of procedural fairness.

[10] Second, the applicant invites me to determine that he submitted sufficient evidence in the forms of his alleged annual business income of $8500 by way of cheques made out to cash, and which he explained at the hearing, replaced the loss of income following the sale of his apartment, while any amount received in excess of $8500 was to be considered a loan. However, the role of this Court on judicial review is not to redo the audit, or to reweigh the evidence that was reviewed at the second administrative level (*Khosa* at paras 65-67). The merits of the requested adjustments were already evaluated a first time by Ms. Lin and Mr. Wheatley. In this case, there is little doubt that the evidence in the record, and the lack thereof, supported Ms. Pacheco's recommendation and Mr. Jones' decision to deny the applicant's requests, after a second review of the matter.

[11] For ease of reference, the amounts originally assessed as net business income and the adjustments that the applicant requested to his T1 tax returns for 2002 to 2007 are set forth in the table below:

Taxation Year	**Original Assessment**	**Relief Requested**	**Adjusted Value**
2002	$54,000	$45,500	$8,500
2003	$54,000	$45,500	$8,500

2004	$40,500	$32,000	$8,500
2005	$18,000	$9,500	$8,500
2006	$12,000	$3,500	$8,500
2007	$12,000	$3,500	$8,500
Totals:	**$190,500**	**$139,500**	**$51,000**

[12] In support of his argument that the impugned decision is unreasonable, the applicant maintains that he earned exactly $8500 in business income each of the six taxation years by providing engineering services to a company incorporated under the laws of British Columbia, Garmeco Canada Consultants Ltd. (previously Garmeco Canada Int'l Consulting Engineers Ltd. until October 1, 2014) [Garmeco]. The applicant's mother, Ms. Hilda Abou-Rached, is the sole shareholder of Garmeco and of the Rached corporate group since the death of the applicant's father in 2006.

[13] The applicant is a professional engineer. He and his family immigrated to Canada from Lebanon in 1989. At one time, the applicant controlled many corporations but disposed of those to his parents and an offshore entity prior to making a proposal in bankruptcy that the courts of British Columbia approved in 2002. Previously, the applicant's family also owned millions of dollars in real estate in Lebanon, while the applicant acted as the president and CEO of a publicly traded corporation called International Hi-Tech Industries Inc. specializing in constructing building panels. However, that corporation ultimately declared bankruptcy in 2010.

[14] While audits of the applicant and companies related to him were underway, in her first-level report, Ms. Lin remarked the following:

(a) According to the applicant, his accountant prepared and filed his tax returns without permission and estimated his income. The applicant had stated that Garmeco paid him $8500 per year;

(b) When asked how he could live on a salary of $8500 per year, the applicant stated that he lives with his mother and that his expenses are marginal, while his other expenses are business related and paid for with corporate credit cards; and

(c) The applicant amended his returns "to benefit his situation". Cheques written to cash were originally classified as shareholder draws to the applicant's mother, and were later reclassified as the applicant's wages to support an annual salary of $8500.

[15] On January 6, 2012, Mr. Wheatley took over the file as Ms. Lin had gone on maternity leave. Mr. Wheatley's contemporaneous notes taken following a phone call with the applicant during the audit, dated February 10, 2012 state that: "Roger also said that the reason he only reports $8,500 is that anything above that amount can be taken by his creditors!" (CTR Tab 33). Moreover, the first-level committee decision minutes state that the applicant wished to report his income at this rate to "qualify for MSP premium assistance" (CTR Tab 53). If nothing else, these statements, which were in the audit record, reasonably support the scepticism with which the auditors and the Delegate approached Garmeco's cheques made out to cash tendered by the applicant to support the requested adjustments.

[16] As aforementioned, the applicant provides "support" for his $8500 business income for each of 2002 to 2007 in the form of copies of cancelled cheques from Garmeco made out to cash. Specifically, as the respondent has pointed out, the applicant provided the CRA anywhere from 3 to 27 cheques in support of each year's claim of $8500 income, as follows:

(a) 2002: 3 cheques totalling $8500
$1500 (May 15) + $4000 (Sept 12) + $3000 (Dec 20)

(b) 2003: 4 cheques totalling $8500
$2000 (Feb 18) + $3000 (May 3) + $3000 (Aug 6) + $1500 (Dec 2)

(c) 2004: 5 cheques totalling $8800
$2200 (Feb 2) + $800 (May 3) + $800 (June 1) + $2000 (June 4) + $3000 (Dec 21)

(d) 2005: 3 cheques totalling $8800
$3200 (April 1) + $1500 (July 25) + $3800 (Dec 20)

Note: The cheques to cash from Garmeco for 2005 provided by RBC and reviewed by the auditor Wheatley total at least $28,300, from which the applicant had selected three cheques totalling $8500 to provide the CRA (CTR Tab 48, working paper entitled "Analysis of 'cash' payments by Garmeco Canada" for 2005).

(e) 2006: 6 cheques totalling $8729
$3000 (Jan 4) + $2000 (April 21) + $2000 (June 26) + $600 (Sept 28) + $1000 (Nov 27) + $129 (Jan 21)

Note: The applicant's accountant also provided cheques to the auditor Lin for 2006 showing the following additional amounts: $2000 (Dec 23) (Tab 16 of applicant's record, p. 32/190), for a total additional amount for 2006 of $2182) (Tab 16 of the applicant's record, letter from accountant to auditor Lin dated October 25, 2011, attached to the applicant's affidavit, with copies of supporting cheques made out to cash for 2005, 2006 and 2007, which includes minor amounts paid to parties on the applicant's behalf).

(f) 2007: 27 cheques totalling $8377
$300 (Feb ?) + $300 (April 20) + $400 (Feb ?) + $500 (April 3) + $2000 (May 14) + $1000 (June 29) + $1000 (July 3) +$1010 (Nov 13) + $36 (April 18) + $121 (Feb ?) + $10 (March 30) + $121 (April 2) + $84 (April 20) + $57 (May 7) + $117 (May 23) + $132 (June 25) + $362 (June 29) + $86 (July 31) + $79 (Aug 31) + $83 (Oct 1) + 83 (Oct 30) + $63 (Nov 16) + $94 (Nov 16) + $79 (Nov 30) + $17 (Dec 18) + $160 (Dec 18) + $83 (Dec 31)

> Note: The applicant's accountant also provided cheques to auditor Lin for 2007 that, as he did for 2006, showed additional amounts (Tab 16 of applicant's record, letter from accountant to auditor Lin dated October 25, 2011, attached to the applicant's affidavit, with copies of supporting cheques made out to cash for 2005, 2006 and 2007).

[17] The applicant did not provide new documents during the second-level review conducted after the Court ordered the reconsideration of the matter. In her report dated February 8, 2017, Ms. Pacheco responded to a number of standard form questions derived from the Guidelines. She notably remarked that the applicant did not exercise reasonable care because he waited until April 2010, and then April 2011, to request the adjustments despite his statement that he was aware of the errors of his former accountants in 2009. Be that as it may, the requested adjustments would have been dismissed even if filed on time. Apparently, the applicant requested taxpayer relief for retroactive tax planning purposes, as he wished to revise his reported income to become eligible for premium assistance related to his medical services plan. With respect to the claim that he was paid $8500 annually by Garmeco, the applicant did not present adequate records to substantiate this arbitrary assessment derived from Garmeco's cheques payable to cash. He did not provide adequate records of employment income and the cancelled cheques marked "cash" from Garmeco did not establish his total business income. In any case, the cancelled cheques suggested that his business income was greater than $8500. Ms. Pacheco further remarked that a CRA auditor had requested a complete set of financial records for Garmeco to quantify the payments made to the applicant. However, the applicant never provided those records. Moreover, Garmeco is a non-compliant corporation as it has a history of failing to file tax returns and of filing its tax returns late. In her view, the applicant should have

access to Garmeco's books and records because it is a family business and his mother is the sole shareholder.

[18] In the Court's opinion, these reasons are rational and intelligible, they are supported by the evidence, and they amply justify Ms. Pacheco's recommendation.

[19] To summarize, while the applicant asserts that his former accountants erroneously stated his income in the initial returns of 2002 to 2007 – a point that does not need to be decided by this Court – it was nevertheless the applicant's onus to provide the Minister with satisfactory evidence establishing that his annual business income received from Garmeco truly amounted to $8500. I find that it was not unreasonable for the decision-maker to conclude that, in the absence of documents such as contracts or invoices establishing the applicant's annual business income received from Garmeco, the cheques made out to "cash" were insufficient to justify adjusting the original assessments outside of the normal reassessment period. Indeed, the auditors and the Delegate had sufficient grounds to question the credibility of any unsupported assertion. In particular, the applicant's unilateral qualification of the nature of the cheques made to "cash" is particularly problematic, given that the auditors had obtained RBC bank statements from Garmeco which apparently contradicted the applicant's claim that his income was exactly $8500 each year. Indeed, the applicant obtained significantly more than $8500 in both 2005 and 2006 from cheques made out to cash (respectively $28,300 and $34,676, at CTR Tabs 48 and 52). Considering the entire factual context, it was open to the decision-maker not to accept that the sums in excess of $8500 constituted loans made by the applicant's parents or mother. After all, the applicant had made statements to the auditors suggesting that he had ulterior motives for

making the requests for adjustments. Indeed, during a meeting with the Taxpayer Relief Officer, the applicant stated that he wished to reduce his reported net business income to qualify for premium assistance from the provincial medical services plan. He also told the auditor that he requested the adjustments "because he thought anything beyond that would be taken by his creditors".

[20] For all these reasons, I find that the Delegate properly exercised its ministerial discretion, and that the decision to deny the requested adjustments does not fall outside a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

[21] In conclusion, this application for judicial review is dismissed. I also note that the CRA is improperly designated as the respondent. Accordingly, the style of cause shall be amended to properly designate the Attorney General of Canada [AGC] as the respondent in place of the CRA. See the following taxpayer relief cases changing the style of cause from either CRA or Minister of National Revenue to AGC: *Klopak v Canada (Attorney General)*, 2019 FC 235; *Takenaka v Canada (Attorney General)*, 2018 FC 347; *Dougal & Co Inc v Canada (Attorney General)*, 2017 FC 1075; *Biswal v Canada (Attorney General*), 2017 FC 529; *Ford v Canada (Attorney General)*, 2015 FC 1057 (in which the Minister of National Revenue was changed to AGC at the respondent's request); *Fung v Canada (Attorney General)*, 2014 FC 934.

[22] Finally, the respondent also seeks costs. Considering all relevant factors, including the extent of the work involved and the relative complexity of the file, as well as the parties' oral submissions on this issue, the proposed amount of $2000 is reasonable in the circumstances.

JUDGMENT in T-505-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. The style of cause is amended to name the Attorney General of Canada as the proper respondent in place of the Canada Revenue Agency; and

3. The respondent is entitled to costs in the amount of $2000.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-505-17
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APPEARANCES:

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Nadine Taylor Pickering	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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