Federal Court  Cour fédérale

Date: 20190625

Docket: T-1373-18

Citation: 2019 FC 860

Ottawa, Ontario, June 25, 2019

PRESENT: The Associate Chief Justice

BETWEEN:

SINA GHAZI

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Minister of National Revenue is asking the Court to strike Mr. Sina Ghazi's application for judicial review, in which Mr. Ghazi alleges that the Canada Revenue Agency [CRA] assessment officers were biased in assessing his tax liability. According to the Minister, this application is a veiled attack on the exclusive jurisdiction of the Tax Court of Canada to assess a taxpayer's liability under the *Excise Tax Act*, RSC 1985, c E-15 [ETA].

II. Background

[2] Mr. Ghazi challenges a decision of the Acting Assistant Director, GST/HST Audit Division, dated June 19, 2018, refusing to suspend Ms. Leslie Olson, Team Leader and Mr. Daniel Malcolm, Section Manager [CRA officers], from any further involvement in his audit because of their misconduct, and a reasonable apprehension of bias against him.

[3] Mr. Ghazi makes an application for:

1. A writ of certiorari quashing the June 19th Decision of the Assistant Director.

2. A writ of mandamus requiring the Minister of National Revenue to cease causing further prejudice to the Applicant, and directing the Minister to suspend Mr. Malcom and Ms. Olson from any further involvement in his audit.

3. A writ of prohibition restricting Mr. Malcolm and Ms. Olson from any further involvement in his audit, and prohibiting the Minister from assessing him for any tax, interest and/or penalties relating to the period 01-01-2013 to 31-12-2017 until at least 90 days after the herein application has been determined by this Court.

4. Costs of this application.

[4] On a motion to strike, the facts alleged by the Applicant are taken as true. In his notice of application, Mr. Ghazi brings the following attacks against the decision of the Respondent's Assistant Director:

1. The CRA officers committed misconduct during the course of the audit resulting in prejudice to the Applicant and creating a reasonable apprehension of bias. Among other things, Ms. Olson indicated that she is predisposed to assessing the Applicant regardless of any information or submissions to the contrary. Mr. Malcolm maliciously berated the Applicant for

requesting disclosure of the auditor's notes (form T2020) and egregiously complained that the request imposed an undue burden on him (notably, the requested document was only 5 pages).

2. On March 28th and on May 4th, 2018, the Applicant filed separate formal service complaints regarding the misconduct by Ms. Olson. On May 31st, 2018, the Applicant filed another formal service complaint relating to the further misconduct by both Mr. Malcolm and Ms. Olson. On June 8th, the Applicant wrote to the Assistant Director requesting that she investigate the misconduct and suspend Mr. Malcolm and Ms. Olson from further involvement in the audit. On June 19th the Assistant Director rendered a terse Decision stating that she was satisfied that the Canada Revenue Agency's policies and procedures were being adhered to.

3. The Decision was not reasonable because, among other things, it lacked justification, transparency and intelligibility. The scant reasons for the Decision were inadequate; they did not indicate the facts reviewed, nor any line of analysis that could reasonably lead to the conclusions arrived at. Further, the Applicant was not permitted any opportunity to respond to the findings. In arriving at her Decision, the Assistant Director failed to observe principles of natural justice and procedural fairness.

4. Finally, the Assistant Director based her decision on erroneous findings of fact made in a perverse or capricious manner, or without regard for the material before her. Instead of addressing the complaints of misconduct and bias by Mr. Malcolm and Ms. Olson, the Decision gave undue consideration to irrelevant factors. Such matters are no defence against allegations of misconduct and bias.

[5] Relevant to the Court’s analysis is the fact that although CRA officer Olson had not yet issued a notice of assessment to Mr. Ghazi, she advised him, in a letter dated January 29, 2018, of a proposed GST/HST adjustment of over $650,000 plus penalties that he would have to pay as a result of being considered a builder in the sale of two real estate properties located in the

Toronto region. This letter refers to applicable provisions of the ETA and ends with the following notice to Mr. Ghazi:

> If you have more information about the proposed adjustments that you would like us to consider, or if you have any questions, please call me at […]. If we do not hear from you before March 1, 2018, we will finalize the review based on the adjustments proposed.
>
> You will then receive a notice of (re)assessment that reflects these changes, and you will be responsible for paying the additional net GST/HST payable.

[6] Through counsel, Mr. Ghazi replied on February 6, 2018 and requested to be provided with all facts relating to the proposed assessment and penalties, along with an explanation of the applicable law and policies. Mr. Ghazi also requested that the March 1st, 2018 deadline be extended to at least 60 days after complete disclosure of the file. Counsel repeated those requests on March 16, 2018 and added that should any one of them be refused, he formally applied for a second-level review by the CRA officers' manager. Meanwhile, he asked "that no further decisions or actions be taken in respect of this matter until such second-level review is completed in order to preserve Mr. Ghazi's rights to seek any available administrative law remedies (as described by the Federal Court of Appeal in *Ereiser v. HMQ*, 2013 FCA 20, at para 37)".

[7] On March 19, 2018, CRA officer Olson responded that since Mr. Ghazi had made an Access to Information and Privacy request [ATIP] for his audit file, the audit department would not be providing disclosure of same. She accepted to extend the March 1st, 2018 deadline until April 24, 2018 as it would allow at least 30 days from the receipt of the ATIP information to respond.

III. Issues

[8] This motion to strike raises the following issue and sub-issues:

> *Does the federal Court have jurisdiction to deal with the matter raised in the application for judicial review? In order to answer that question, the Court must consider:*
>
> > (1) Whether the notice of application states a cognizable administrative law claim which can be brought in the Federal Court;
> >
> > (2) Whether the Federal Court is prevented from dealing with the administrative law claim by virtue of section 18.5 of the *Federal Courts Act* or some other legal principle; and
> >
> > (3) Whether the Federal Court can grant the relief sought.

IV. Analysis

A. *Test on motion to strike*

[9] The Federal Court of Appeal reviewed the test on a motion to strike in *Canada (Minister of National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250:

> [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success" [citation omitted]. There must be a "show stopper" or a "knockout punch" — an obvious, fatal flaw striking at the root of this Court's power to entertain the application [citations omitted].

[10] This is a high threshold to meet and, as the Court on a motion to strike may not have all of the relevant facts or law before it, the application will only be struck out in the clearest of cases.

B. *Preliminary issue – Affidavit Evidence*

[11] The Applicant submits that, as the Respondent brought this motion to strike under Rule 221(1)(*a*) of the *Federal Courts Rules*, SOR/98-106, she is not permitted to rely on affidavit evidence or any other evidence on the motion. The logic behind this rule is that the flaw(s) in the notice of application should be apparent on its face. The affidavit evidence could also trigger reply affidavits, cross-examinations, refusal questions, etc., resulting in delay, which is contrary to subsection 18.4(1) of the Act, which requires applications to be heard and determined without delay and in a summary way. The Applicant further argues that the Respondent does not present the facts accurately and tries to use the affidavit evidence to challenge the deemed facts. If the Respondent must rely on an affidavit to support this motion, the Respondent has not met the test, as it is not plain and obvious that the application is bereft of any chance of success.

[12] However, there are exceptions to the general rule against admitting affidavits on motions to strike, one of which is "where a document is referred to and incorporated by reference in a notice of application" (*JP Morgan*, at para 54).

[13] In this case, the affidavit appends as exhibits letters between the taxpayer and the CRA officers that followed the proposed assessment. It also attaches service complaints filed by the taxpayer. All of these documents are referred to in the notice of application and they are at the heart of Mr. Ghazi's complaint about the CRA officers. The affidavit does not otherwise contain any evidence.

[14] Contrary to the Applicant's submissions, an affidavit that merely appends documents referred to in the notice of application does not generally "trigger reply affidavits, cross-examinations and refused questions".

[15] Therefore, the affidavit of Jennifer Larner, sworn September 13, 2018, will be accepted as evidence on this motion to strike.

C. *Does the federal Court have jurisdiction to deal with the matter raised in the application for judicial review?*

[16] Pursuant to subsection 12(1) of the *Tax Court of Canada Act*, RSC 1985, c T-2 the Tax Court has exclusive jurisdiction to hear references and appeals on matters arising under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) and the *Excise Tax Act*, RSC 1985, c E-15, among others.

[17] On the other hand, the Federal Court has jurisdiction under subsection 18(1) of the *Federal Courts Act* to review decisions made by federal boards, commissions or other tribunals. Therefore, in appropriate circumstances, the Respondent's decisions may be judicially reviewed by this Court (*Canada v Addison & Leyen Ltd*, 2007 SCC 33 at paras 8, 11). But as a corollary to subsection 12(1) of the *Tax Court of Canada Act*, section 18.5 of the *Federal Courts Act* carves out the Federal Court's jurisdiction over matters that can be appealed to the Tax Court of Canada.

[18] In short, administrative law matters can be judicially reviewed by the Federal Court but matters of tax assessment must be left to the Tax Court.

[19] Mr. Ghazi submits that there is no tax assessment in his case, which would preclude the Tax Court from hearing an appeal under subsection 12(1). As well, the Federal Court of Appeal has recognized that the Tax Court cannot review issues relating to the Minister's process or conduct. The Applicant relies on *JP Morgan* and *Ereiser* for the proposition that the Federal Court retains jurisdiction in these matters.

[20] In fact, the parties agree that if the circumstances of the notice of application fall within the jurisdiction of the Tax Court, then the application would be barred from being considered by this Court. The disagreement lies in the actual nature of the matter.

> (1) Is there a cognizable administrative law claim which can be brought in the Federal Court?

[21] Mr. Ghazi alleges bias and procedural unfairness to attack the decision's validity. He says bias is simply wrong and should be sufficient to set aside an administrative decision. He also alleges that the June 19th decision lacks justification, transparency and intelligibility.

[22] Mr. Ghazi argues that requesting an impartial tax assessor does not lead to an evasion of a tax assessment. The Applicant argues that the prejudice is self-evident but it also includes "unnecessary delay and expense".

[23] The grounds alleged by the Applicant appear *prima facie* to be administrative law claims. They fall within the categories of "procedural unacceptability" and "substantive unacceptability" outlined in *JP Morgan*.

[24] The Respondent, on the other hand, submits that the Applicant is essentially challenging the merits of the tax assessment. She argues that the court should look beyond the words in the notice of application and note that the Applicant alleges "prejudice" without elaborating on the nature of that prejudice. She also points to a letter sent from Mr. Ghazi to the CRA explaining that the "CRA's proposed assessment is contrary to the facts and the law and it is unfounded."

[25] The crucial step in this case is determining Mr. Ghazi's ultimate goal: whether he is bringing the application simply to right the procedural defects or whether the notion of procedural defects is a mask for his true desire to control the tax assessment process. As Justice Stratas puts it in *JP Morgan*:

> [49] Armed with sophisticated wordsmithing tools and cunning minds, skilful pleaders can make Tax Court matters sound like administrative law matters when they are nothing of the sort. When those pleaders illegitimately succeed, they frustrate Parliament's intention to have the Tax Court exclusively decide Tax Court matters. Therefore, in considering a motion to strike, the Court must read the notice of application with a view to understanding the real essence of the application.
>
> [50] The Court must gain "a realistic appreciation" of the application's "essential character" by reading it holistically and practically without fastening onto matters of form [citations omitted].

[26] When reading the notice of application (in addition to reading the correspondence exchanged between counsel and the CRA officers), it is clear to me that Mr. Ghazi is seeking to control the tax assessment process:

> 1. A writ of certiorari quashing the June 19th Decision of the Assistant Director.
>
> 2. A writ of mandamus requiring the Minister of National Revenue (the "Minister") to cease causing further prejudice to the Applicant, and directing the Minister to suspend Mr. Daniel Malcom and Ms. Leslie Olson from any further involvement in the audit of the Applicant.
>
> 3. A writ of prohibition restricting Mr. Daniel Malcolm and Ms. Leslie Olson from any further involvement in the audit of the Applicant, and prohibiting the Minister from assessing the Applicant for any tax, interest and/or penalties relating to the period 01-01-2013 to 31-12-2017 until at least 90 days after the herein application has been determined by this Court.
>
> 4. Costs of this application.
>
> [Emphasis added.]

[27] Further, looking at the basis of the bias allegations, it becomes even clearer that Mr. Ghazi actually takes issue with certain evidence being disregarded or ignored and with the ETA's application.

[28] Regarding the June 19, 2018 decision, the Assistant Director reviewed whether the CRA officers were following the law:

> Based on the concerns raised in your letter of June 8, 2018, I have reviewed the manner in which the audit is being conducted. I am satisfied that the Canada Revenue Agency's (CRA) policies, procedures and the Excise Tax Act (ETA) are being adhered to. There is no basis or grounds on which to have the audit file transferred.
>
> [Emphasis added.]

[29] In sum, there is no true allegation of bias outlined in the facts. Mr. Ghazi is predominantly alleging mistreatment of evidence. While he is alleging issues regarding procedural fairness, the "procedural defects" complained of are matters of law within the jurisdiction of the Tax Court - he takes issue with the Assistant Director's finding that the CRA officers are following proper procedure and properly applying the ETA. Matters of law and issues regarding mistreatment of evidence fall within the jurisdiction of the Tax Court.

[30] Bias has no effect on the tax assessment process as tax assessments are either right or wrong. If the tax assessment is wrong, it does not matter if the process was flawed, and the only way to address the issue is on appeal to the Tax Court. Procedural defects in a tax assessment by the Minister are not sufficient grounds on their own to set aside the assessment (*Webster v Canada (Attorney General)*, 2003 FCA 388).

[31] At paragraph 82 of *JP Morgan*, Justice Stratas summarizes the different types of defects which can be cured by an appeal to the Tax Court, one of which is applicable to Mr. Ghazi's notice of application:

> *Inadequate procedures followed by the Minister in making the assessment.* Procedural defects committed by the Minister in making the assessment are not, themselves, grounds for setting aside the assessment: *Main Rehabilitation Co. v. R.*, 2004 FCA 403 (F.C.A.) at paragraph 7; *Webster*, supra at paragraph 20; *Consumers' Gas Co. v. R.* (1986), [1987] 2 F.C. 60 (Fed. C.A.) at page 67. To the extent the Minister ignored, disregarded, suppressed or misapprehended evidence, an appeal under the General Procedure in the Tax Court is an adequate, curative remedy. In the Tax Court appeal, the parties will have the opportunity to discover and present documentary and oral evidence, and make submissions. Procedural rights available later can cure earlier procedural defects: *Posluns v. Toronto Stock Exchange*, [1968] 1 S.C.R. 330 (S.C.C.); *King v. University of*

> *Saskatchewan*, [1969] S.C.R. 678 (S.C.C.) at page 689; *Taiga Works Wilderness Equipment Ltd*., Re, 2010 BCCA 97 (B.C. C.A.) at paragraph 28; *Histed v. Law Society (Manitoba)*, 2006 MBCA 89, 274 D.L.R. (4th) 326 (Man. C.A.); *McNamara v. Ontario Racing Commission* (1998), 164 D.L.R. (4th) 99, 111 O.A.C. 375 (Ont. C.A.).
>
> [Emphasis added.]

[32] Even if the Tax Court cannot redress a procedural fairness breach, it does not follow that the Federal Court has this power. In matters of tax liability, tax is either payable or not, based on the facts and the law.

[33] While I determined that the Applicant is not truly arguing bias, even if he was, *JP Morgan* makes it clear that it would not affect his assessment.

[34] Mr. Ghazi draws the Court's attention to paragraph 98 of *JP Morgan* to argue that bias is reviewable by the Federal Court. With respect, I do not believe that the door left open by Justice Stratas is that widely open. Justice Stratas seems to have wanted to limit this Court's intervention to cases where CRA's improper dealing with a taxpayer leads to an unfair or discriminatory result:

> [98] Nevertheless, even at this juncture, one can imagine examples of judicial reviews that might avoid the three objections to judicial review. Suppose that the Minister launches aggressive methods of investigation against members of a political party because of hostility to that political party in circumstances where immediate, effective relief is required. Suppose that the Minister could issue an assessment under section 160 of the Income Tax Act against any one of the five directors of a corporation for the corporation's tax liability. Only one of the directors is a person of colour. The Minister issues an assessment only against that director, and only because of the colour of his skin, in circumstances where immediate, effective relief is required.
>
> [Emphasis added.]

[35] This is simply not the case here. Mr. Ghazi simply alleges that the CRA officers are biased against him as they ignored evidence.

[36] Further, Mr. Ghazi takes issue with the June 19, 2018 letter where the Assistant Director determined that there were no grounds to transfer the audit file. Specifically, the Assistant Director stated "I am satisfied that the Canada Revenue Agency's (CRA) policies, procedures and the Excise Tax Act (ETA) are being adhered to." Whether the CRA officers are following CRA procedures and policies and the ETA are matters of law within the jurisdiction of the Tax Court. As stated in *Webster*:

> [21] I would add that the right to appeal an income tax assessment to the Tax Court is a substantial one. The mandate of the Tax Court is to decide, on the basis of a trial at which both parties will have the opportunity to present documentary and oral evidence, whether the assessments under appeal are correct in law, or not. If the assessments are incorrect as a matter of law, it will not matter whether the objection process was flawed. If they are correct, they must stand even if the objection process was flawed.
>
> [Emphasis added.]

[37] Therefore, I am of the view that Mr. Ghazi does not raise a true administrative law claim and that the issues raised in his application for judicial review fall within the jurisdiction of the Tax Court.

> (2) Is the Federal Court prevented from dealing with the administrative law claim by virtue of section 18.5 of the *Federal Courts Act* or some other legal principle?

[38] In any event, even if Mr. Ghazi had raised an administrative law claim, the relief sought is an interlocutory step which could only be granted in exceptional cases. Judicial review of interlocutory decisions results in fragmentation of the administrative process set up by Parliament.

[39] It is clear from the June 19, 2018 decision that the CRA was still waiting for the Applicant to respond to the concerns regarding his assertion that he is not a builder as defined in the ETA. The CRA has not made any final decision on this matter but has only raised concerns regarding this point of the Applicant's proposed assessment. As stated by the Federal Court of Appeal in *Canada (Border Services) v CB Powell Limited*, 2010 FCA 61, the administrative process must be complete before the Applicant can seek relief from the court:

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. <u>All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course</u>. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or

> when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> [Emphasis added.]

[40] Justice Stratas adds the following in *CB Powell*:

> [33] … Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted [citations omitted] ….

[41] Therefore, the administrative process should be allowed to continue and if ever it results in an assessment that is in line with CRA's proposed assessment, Mr. Ghazi will be able to object, and eventually file an appeal *de novo* before the Tax Court. As stated by Justice Stratas at paragraph 91 of *JP Morgan*, section 18.5 of the Act can apply to carve out the Federal Court's jurisdiction whether the appeal to the Tax Court can be launched now or later.

[42] With all due respect, I view the additional step taken before this Court as causing needless additional expenses and delay.

[43] In addition to the above analysis, one needs to keep in mind that this Court has the discretion to refuse to hear an application for judicial review if the Applicant has an adequate alternative remedy available. In this case Mr. Ghazi has filed a formal service complaint to the Office of the Taxpayers' Ombudsman and a formal Service-Related Complaint with the Appeals

Division of the CRA. The remedy sought does not need to be identical, only adequate. In addition, any relief not covered by the Ombudsman or the Appeals Division can be sought through a civil claim (*JP Morgan*, at para 89).

[44] Judicial review is a means of last resort and it should not be sought when there are alternative remedies available.

[45] The Supreme Court of Canada in *Strickland v Canada (Attorney General)*, 2015 SCC 37reviewed when an adequate alternative remedy would be appropriate grounds to strike an application for judicial review. The Supreme Court stated:

> [42] The cases identify a number of considerations relevant to deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application. These considerations include the convenience of the alternative remedy; the nature of the error alleged; the nature of the other forum which could deal with the issue, including its remedial capacity; the existence of adequate and effective recourse in the forum in which litigation is already taking place; expeditiousness; the relative expertise of the alternative decision-maker; economical use of judicial resources; and cost: Matsqui, at para. 37; C.B. Powell Ltd. c. Canada (Agence des services frontaliers), 2010 FCA 61, [2011] 2 F.C.R. 332 (F.C.A.), at para. 31; Mullan, at pp. 430-31; Brown and Evans, at topics 3:2110 and 3:2330; Harelkin, at p. 588. In order for an alternative forum or remedy to be adequate, neither the process nor the remedy need be identical to those available on judicial review. As Brown and Evans put it, "in each context the reviewing court applies the same basic test: is the alternative remedy adequate in all the circumstances to address the applicant's grievance?": at topic 3:2100.
>
> [Emphasis added.]

[46] In my view, Mr. Ghazi can seek relief from the Tax Court for most of his complaints regarding the CRA officers' proposed assessment and the Assistant Director's decision. In

addition, he made a complaint to the Taxpayers' Ombudsman alleging, among other things, that the CRA employees' conduct should be reviewed under section 5 of the Taxpayer Bill of Rights. In the present application, Mr. Ghazi is alleging that he was not treated fairly or courteously. This, in my view falls squarely within the mandate of the Taxpayers' Ombudsman who is charged with "assist[ing], advis[ing], and inform[ing] the Minister about any matter relating to services provided to a taxpayer by the [CRA]." Finally, the Ombudsman is mandated to resolve issues "effectively and efficiently" and "to communicate with any officials that may be identified by the [CRA]." It is true that the Ombudsman's authority is limited and that his or her recommendations are not binding. However, in light of my previous finding that any unfairness can be cured by a *de novo* appeal to the Tax Court, I find that a complaint to the Ombudsman is an adequate alternative remedy in these circumstances.

[47] Should there be any other outstanding remedy sought by Mr. Ghazi, a civil action may also be open to him. As stated in *JP Morgan*:

> [89] In the tax context, to the extent that the Minister has engaged in reprehensible conduct that is beyond the reach of the Tax Court's powers, adequate and effective recourses may be available by means other than an application for judicial review in the Federal Court: Tele-Mobile, supra; Ereiser, supra at paragraph 38. For example, breaches of agreements, careless, malicious or fraudulent actions, inexcusable delay, and abuses of process may be redressed by way of actions for breach of contract, regulatory negligence, negligent misrepresentation, fraud, abuse of process, or misfeasance in public office: in the tax context see, e.g., Swift v. The Queen, 2004 FCA 316; Leroux v. Canada Revenue Agency, 2012 BCCA 63 at paragraph 22; Gardner v. Canada (Attorney General), 2012 ONSC 1837, rev'd on another point 2013 ONCA 423; McCreight v. Canada (Attorney General), 2013 ONCA 483. Whether these actually constitute adequate, effective recourses depends upon the circumstances of the particular case.

[48] Therefore, an application for judicial review is premature as there are other adequate remedies available to Mr. Ghazi.

(3) Can the Federal Court grant the relief sought?

(a) *Mandamus*

[49] The Respondent submits that the Applicant does not meet the seven-part test to grant a mandamus:

1. There must be a public legal duty to act;
2. The duty must be owed to the applicant;
3. There is a clear right to performance of that duty;
4. No other adequate remedy is available to the applicant;
5. The order sought will be of some practical value or effect;
6. The court in the exercise of its discretion finds no equitable bar for relief; and
7. On a "balance of convenience" an order in the nature of mandamus should (or should not) be issued.

[50] She argues that step one is not met as there is no such duty by the Minister to suspend the CRA employees. As the Applicant does not meet step one, he cannot meet steps two and three. In addition, step four is not met as there are other adequate remedies.

[51] Mr. Ghazi is rather of the opinion that the Respondent's arguments are not supported by any case law and that cross-examination and affidavit evidence may be necessary to assess the Minister's duty and other elements of the test.

[52] In my view, Mr. Ghazi has not provided the basis for the Minister's public legal duty to suspend the employees or to "cease causing further prejudice." Under the *Canada Revenue Agency Act*, SC 1999, c 17 there does not appear to be any such duty placed upon the Minister:

Powers, duties, and functions of Minister	**Attributions**
6 (1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, not by law assigned to any department, board or agency of the Government of Canada other than the Agency, relating to	**6 (1)** Les pouvoirs et fonctions du ministre s'étendent d'une façon générale à tous les domaines de compétence du Parlement non attribués de droit aux ministères ou organismes fédéraux, à l'exception de l'Agence, et liés :
(a) [Repealed, 2005, c. 38, s. 40]	**a)** [Abrogé, 2005, ch. 38, art. 40]
(b) duties of excise;	**b)** aux droits d'accise;
(c) stamp duties and the preparation and issue of stamps and stamped paper, except postage stamps, and the Excise Tax Act, except as therein otherwise provided;	**c)** aux droits de timbre, à la préparation et à l'émission de timbres — à l'exclusion des timbres-poste — et de papier timbré, et à la *Loi sur la taxe d'accise*, sauf disposition contraire de celle-ci;
(d) internal taxes, unless otherwise provided, including income taxes;	**d)** sauf disposition contraire, aux impôts intérieurs, notamment l'impôt sur le revenu;
(d.1) the collection of debts due to Her Majesty under Part V.1 of the Customs Act; and	**d.1)** à la perception des créances de Sa Majesté sous le régime de la partie V.1 de la *Loi sur*

	les douanes;
(e) such other subjects as may be assigned to the Minister by Parliament or the Governor in Council.	**e)** aux autres secteurs que le Parlement ou le gouverneur en conseil peut lui attribuer.

[53] Given that the first step of the test to grant a writ of *mandamus* is not met, this means that steps two and three must also fail. Additionally, as discussed above, there are other adequate remedies open to the Applicant. Therefore, step four also fails.

[54] As it is plain and obvious that the test for mandamus cannot be satisfied, this order for relief should be struck from the notice of application.

(b) *Prohibition*

[55] The Federal Court cannot prohibit the Minister from carrying out her duties under the ETA, such as assessing tax in accordance with the law. The Federal Court of Appeal in *JP Morgan* noted that:

> [78] In this regard, as far as the assessments of a taxpayer's own liability are concerned, the Minister does not have "any discretion whatever in the way in which [she] must apply the Income Tax Act" and must "follow it absolutely" [citations omitted]. This Court cannot stop the Minister from carrying out this duty [citations omitted].
>
> [Emphasis added.]

[56] Specifically addressing the ETA, the Federal Court of Appeal stated in *Canada Revenue Agency v Tele-Mobile Company Partnership*, 2011 FCA 89:

> [4] We note that if prohibition is granted because of these alleged consequences, the Minister cannot issue an assessment — in effect, as a matter of law, the Minister will be obligated to forgive a tax liability that he believes is present, solely because of alleged hardships that the taxpayer will suffer.
>
> [5] In our view, that cannot be. The Court cannot stop the Minister from carrying out his statutory duty under the Excise Tax Act, R.S.C. 1985, c. E-15, subsection 275(1) to assess GST payable by law merely because doing so will impose unfair and onerous obligations and financial hardships upon the taxpayer.

[57] Under the ETA, the Minister is bound to make an assessment quickly pursuant to subsection 81.1(3), and is not bound by the information provided or requested by the taxpayer pursuant to subsection 81.1(4):

Completion of assessment	**Établissement d'une cotisation**
(3) An assessment shall be completed with all due dispatch and may be performed in such manner and form and by such procedure as the Minister considers appropriate.	**(3)** Une cotisation doit être établie avec toute la célérité raisonnable et peut être exécutée de la manière et en la forme et selon la procédure que le ministre juge appropriée.
Minister not bound	**Le présent paragraphe ne lie pas le ministre**
(4) The Minister is not bound by any return, application or information supplied by or on behalf of any person and may make an assessment, notwithstanding any return, application or information so supplied or that no return, application or	**(4)** Le ministre n'est pas lié par une déclaration, une demande ou des renseignements fournis par ou au nom d'une personne et il peut établir une cotisation, malgré toute déclaration, demande ou renseignements ainsi fournis ou malgré le fait qu'aucune déclaration,

information has been supplied.	demande ni renseignements n'ont été fournis.

[58] An excerpt from *ColasCanada Inc v Canada (National Revenue)*, 2014 FC 452 (discussing the relief of mandamus) also addresses the point of timing by stating:

> [29] Furthermore, I think it should be remembered that granting such a remedy would allow ColasCanada to control when an audit file is in fact ready and might result in a notice of assessment. The efficiency and effectiveness of the tax regime cannot contemplate such an approach.

[59] These excerpts show that the Federal Court cannot interfere with the duties of the Minister in conducting assessments nor should the Federal Court interfere with the manner in which the Minister chooses to conduct assessments, including timing. Therefore, the Federal Court cannot order a writ of prohibition which dictates who is involved in the audit process or includes a time restraint on the audit process. These decisions are within the sole purview of the Minister.

[60] Therefore, the Applicant's request for relief to restrict the CRA officers' involvement in the audit and to restrict the Minister's audit powers must be struck.

D. *Final consideration*

[61] After the hearing of this motion, counsel for Mr. Ghazi wrote to the Court, with copy to the Respondent, in order to alert me of the decision of this Court issued on March 15, 2019 in

Valero Energy Inc v Canada (Attorney General), 2019 FC 319, in which Justice Martine St-Louis dismissed a motion to strike in what counsel argues are similar circumstances.

[62] Without getting too much into the reasons of the Court in *Valero*, suffice it to say that the facts of that case can be distinguished from the facts before me. Justice St-Louis was dealing with the discretionary decision of the CRA to derogate from the statutory obligation imposed on a resident to withhold 15% of fees and payments made to a non-resident supplier. First, withholdings made pursuant to the *Income tax Act* are not assessments (*Beggs v The Queen*, 2016 TCC 11). Second, discretionary decisions by the CRA and the Respondent do not fall under the exclusive jurisdiction of the Tax Court; they are reviewable by this Court.

V. CONCLUSION

[63] In summary, the Respondent's motion is granted and the application for judicial review is struck as:

1. Judicial review is a means of last resort;
2. Most of the matters raised by Mr. Ghazi are within the jurisdiction of the Tax Court, pursuant to subsection 12(1) of the *Tax Court Act*;
3. The remaining issue of being berated by CRA officer, if not within the jurisdiction of the Tax Court, can be adequately dealt with by a complaint to the Taxpayers' Ombudsman; and
4. A writ of prohibition and a writ of mandamus are not available to the Applicant under these circumstances.

JUDGMENT in T-1373-18

THIS COURT'S JUDGMENT is that:

1. The Respondent's motion is granted;

2. The Applicant's application for judicial review is struck out without leave to amend;

3. Costs are granted in favour of the Respondent.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1373-18
STYLE OF CAUSE:	SINA GHAZI v MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 6, 2019
JUDGMENT AND REASONS:	THE ASSOCIATE CHIEF JUSTICE GAGNÉ
DATED:	JUNE 25, 2019

APPEARANCES:

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