Federal Court Cour fédérale

Date: 20210705

Docket: T-2070-19

Citation: 2021 FC 707

Ottawa, Ontario, July 5, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

AMDOCS CANADIAN MANAGED SERVICES INC.

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Amdocs Canadian Managed Services Inc. ("Amdocs"), is a Canadian corporation. Due to mismanagement on behalf of one of its employees, Mr. Michael Buchheit, the Applicant did not cooperate with the Canada Revenue Agency (the "CRA") during several audits of the Applicant. One such audit concerning the Applicant's 2012 taxation year (the "2012 Audit") resulted in a reassessment that increased the Applicant's income tax payable for

that year (the "2012 Reassessment"). By the time Mr. Buccheit informed his superior, Mr. Omri Yaniv, of the 2012 Reassessment, the Applicant was barred from objecting to that reassessment by virtue of the limitation periods under sections 165 and 166.1 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (the "*Act*").

[2] Seeking redress, the Applicant requested that the Minister of National Revenue (the "Minister") exercise its discretion to reopen the 2012 Audit under and, in turn, reassess the Applicant's 2012 taxation year pursuant to sections 152(4) and 231.1 of the *Act*. The Minister refused, noting the Applicant's non-cooperation with the CRA during the 2012 Audit and the Applicant's failure to object to the 2012 Reassessment, among other things.

[3] The Applicant submits the Minister unreasonably exercised its discretion, as the Minister failed to justify its decision in light of evidence that, according to the Applicant, displays the 2012 Reassessment was made on an incorrect factual basis. In addition, the Applicant submits the Minister failed to justify its decision in light of several relevant authorities and improperly relied upon the authorities cited in its decision.

[4] For the reasons that follow, I find the Minister's decision is reasonable. The Minister's decision is internally coherent and justified in relation to the relevant facts and law, and the Applicant has not identified any flaws in the Minister's decision that are sufficiently central or significant. I therefore dismiss this application for judicial review.

II. Facts

A. *The Applicant and its employees*

[5] The Applicant is part of the Amdocs group of companies ("Amdocs Group"). The Amdocs Group provides software and related services internationally for communications, media, and entertainment service providers.

[6] The Applicant has previously entered into transactions with non-residents of Canada with whom it does not deal at arm's length ("Transfer Pricing Transactions"), including during the Applicant's 2012 taxation year with Amdocs Development Ltd., a resident of Cyprus ("Amdocs Cyprus").

[7] Mr. Yaniv is the global head of tax for Amdocs Group. As part of his duties, Mr. Yaniv is responsible for all of the global tax matters involving the Amdocs Group, including the Applicant.

[8] Mr. Buchheit was the Applicant's tax manager until August 2019, when his employment was terminated. As part of his duties, Mr. Buchheit was required to update Mr. Yaniv about significant Canadian tax matters affecting the Applicant, including any audits and assessments by the CRA, and respond to queries and correspondence received from the CRA.

B. *The 2012 Audit and the Applicant's failure to respond*

[9] The Minister originally assessed the Applicant's 2012 taxation year on November 9, 2012.

[10] On October 29, 2013, the Minister commenced the 2012 Audit. Included in the 2012 Audit was a review of the Applicant's Transfer Pricing Transactions with Amdocs Cyprus.

[11] Mr. Buchheit was the sole contact person provided by the Applicant to the CRA. Consequently, the CRA sent all correspondence for the Applicant to Mr. Buchheit, who was then to inform Mr. Yaniv of such matters.

[12] The Applicant, through Mr. Buchheit, responded sporadically to the CRA's correspondence regarding the 2012 Audit. In particular, the Applicant failed to respond to several queries made by the CRA in early 2016. The Applicant provided the CRA with some information between March and May 2016, but it then ceased responding to the CRA's requests until after February 28, 2017.

[13] Due to the Applicant's non-compliance, the CRA decided to narrow the scope of the 2012 Audit and use a methodology that it does not "normally recommend."

[14] In a letter dated January 19, 2017, the CRA outlined its position to the Applicant concerning its reassessment of the Applicant's 2012 taxation year and invited the Applicant to

submit further information within 30 days (the "Proposal Letter"). The Applicant did not respond to the Proposal Letter.

[15] On February 28, 2017, the Department of Justice wrote a letter to the Applicant's counsel ("DOJ Letter"). The DOJ Letter stated the Applicant had been uncommunicative and uncooperative during the 2012 Audit and encouraged the Applicant to respond to all of the outstanding queries.

[16] In response to the DOJ Letter, Mr. Yaniv learned of the CRA's outstanding requests and the Applicant provided further information to the CRA in March and April 2017. Mr. Yaniv, however, did not directly contact the CRA to clarify whether the 2012 Audit was proceeding on-track, and he did not change Mr. Buchheit's reporting protocols or provide an additional contact person for the Applicant to the CRA.

[17] On March 2, 2017, the Minister issued the 2012 Reassessment, which increased the Applicant's income tax payable for the 2012 taxation year by $3,353,906. Mr. Buchheit did not inform Mr. Yaniv of the 2012 Reassessment or serve a notice of objection within the relevant limitation period under section 165 of the *Act*.

[18] The CRA's audits also resulted in reassessments of the Applicant's 2013 and 2014 taxation years. Again, Mr. Buchheit did not inform Mr. Yaniv of these reassessments or serve notices of objection within the relevant limitation period under section 165 of the *Act*.

[19] In July 2019, Mr. Yaniv became aware of the 2012 Reassessment and reassessments concerning the Applicant's 2013 and 2014 taxation years when a customer of the Applicant received a garnishment order from the CRA.

[20] With respect to the Applicant's 2013 and 2014 taxation years, the Applicant was able to request the Minister extend the time for the Applicant to object to those reassessments, as the limitation period under section 166.1 of the *Act* for doing so had not yet elapsed. The Applicant successfully requested such extensions and, as a result, submitted notices of objection for those reassessments.

[21] With respect to the Applicant's 2012 taxation year, the Applicant was and remains barred from requesting an extension to object to the 2012 Reassessment, as the limitation period for doing so under section 166.1 of the *Act* had elapsed by the time Mr. Yaniv learned of that reassessment. The Applicant is therefore unable to object to the 2012 Reassessment.

C. *Request to reopen the 2012 Audit*

[22] On July 28, 2019, the Applicant's representatives met with the CRA's representatives and requested that the Minister reopen the 2012 Audit and reassess the Applicant's 2012 taxation year having regard to further information that the Applicant would provide. At that meeting, the CRA's representatives expressed concern over the Minister's authority to reassess the Applicant's 2012 taxation year and invited the Applicant to make submissions on that issue.

[23] On September 12, 2019, the Applicant's counsel sent a letter to the CRA explaining why the Minister has the authority to reassess the Applicant's 2012 taxation year under subsection 152(4) of the *Act* (the "Request Submissions"). In addition, the Request Submissions explained why the Minister was not barred from doing so by the *Canada-Cyprus Income Tax Convention* (the "*Cyprus Convention*"). The *Cyprus Convention* is a bilateral treaty between Canada and Cyprus that stipulates a five-year limitation period for increasing the tax base of a resident of either contracting state, among other things.

[24] On November 12, 2019, Mr. Yaniv met with the CRA's representatives and repeated the Applicant's request that CRA reopen the 2012 Audit and reassess the Applicant's 2012 taxation year. The CRA's representatives informed Mr. Yaniv that the Minister was not prepared to reopen the 2012 Audit. Mr. Yaniv asked the CRA's representatives to reconsider the Minister's position, and they agreed.

D. *Decision Under Review*

[25] In a letter dated November 25, 2019, the Minister informed the Applicant of its decision not to reopen the 2012 Audit, despite reconsidering the Applicant's request. That decision is the decision under review in this application.

[26] The Minister did not dispute that it had the authority to reassess the Applicant's 2012 taxation year under subsection 152(4) of the *Act*, as asserted by the Applicant in the Request Submissions. However, the Minister refused to reopen the 2012 Audit, and in turn reassess the Applicant's 2012 taxation year, because:

(a) The Applicant was, at all times, informed of all audit actions and correspondence for the 2012 taxation year.

(b) The Applicant had opportunities to make representations and submit information during the 2012 Audit but failed to do so.

(c) The Applicant also failed to:

i. respond to all of the CRA's requests and queries;

ii. reply to the Proposal Letter and the 2012 Reassessment;

iii. object to the 2012 Reassessment;

iv. request an extension of time to object to the 2012 Reassessment; and

v. seek a Mutual Agreement Procedure under the *Cyprus Convention*.

(d) All audit activity for the Applicant's 2012 taxation year concluded in a "normal administrative mode" in 2017 (*Cal Investments Ltd v R*, [1991] 1 FC 199, 37 FTR 250 (FCTD) ("*Cal Investments*") at para 44).

(e) The power to accept a waiver "lies exclusively with the Minister" (*Holmes v The Queen*, 2005 TCC 403 ("*Holmes*") at para 20).

[27] To summarize, the Minister concluded in the final paragraph of its decision:

> Our records indicate that [the 2012 Audit] was conducted and completed in 2017. Included in those records are numerous

> attempts to obtain information and full disclosure of all audit actions and correspondence of the reassessment and ample opportunity to provide representations. ACMSI [*i.e.*, the Applicant] was given full opportunity to reply prior to the reassessment of March 2, 2017, as such, the Minister is not prepared to reopen its audit for ACMSI's 2012 taxation year.

III. Statutory Framework

A. *Reassessments*

[28] Under subsection 152(4)(b)(iii) of the *Act*, the Minister may reassess a taxpayer within three years after the end of the taxpayer's normal reassessment period if the reassessment is made as a consequence of a Transfer Pricing Transaction:

Assessment and reassessment	**Cotisation et nouvelle cotisation**
152 (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	152 (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 pour

	l'année que dans les cas suivants:
[…]	[…]
(b) the assessment, reassessment or additional assessment is made before the day that is 3 years after the end of the normal reassessment period for the taxpayer in respect of the year and	b) la cotisation est établie avant le jour qui suit de trois ans la fin de la période normale de nouvelle cotisation applicable au contribuable pour l'année et, selon le cas:
[…]	[…]
(iii) is made	(iii) est établie, selon le cas :
(A) as a consequence of a transaction involving the taxpayer and a non-resident person with whom the taxpayer was not dealing at arm's length […]	(A) par suite de la conclusion d'une opération impliquant le contribuable et une personne non-résidente avec laquelle il avait un lien de dépendance […]

[29] Under subsection 152(3.1)(a) of the *Act*, the Applicant's normal reassessment period for a taxation year ends four years after the date of the original assessment for that year because it is not a Canadian-controlled private corporation:

Definition of normal reassessment period	**Période normale de nouvelle cotisation**
152 (3.1) For the purposes of subsections (4), (4.01), (4.2), (4.3), (5) and (9), the normal reassessment period for a taxpayer in respect of a taxation year is	152 (3.1) Pour l'application des paragraphes (4), (4.01), (4.2), (4.3), (5) et (9), la période normale de nouvelle cotisation applicable à un contribuable pour une année d'imposition s'étend sur les périodes suivantes :

(a) if at the end of the year the taxpayer is a mutual fund trust or a corporation other than a Canadian-controlled private corporation, the period that ends four years after the earlier of the day of sending of a notice of an original assessment under this Part in respect of the taxpayer for the year and the day of sending of an original notification that no tax is payable by the taxpayer for the year […]	a) quatre ans suivant soit la date d'envoi d'un avis de première cotisation en vertu de la présente partie le concernant pour l'année, soit, si elle est antérieure, la date d'envoi d'une première notification portant qu'aucun impôt n'est payable par lui pour l'année, si, à la fin de l'année, le contribuable est une fiducie de fonds commun de placement ou une société autre qu'une société privée sous contrôle canadien […]

[30] The original assessment for the Applicant's 2012 taxation year was dated November 9, 2012. Pursuant to subsection 152(3.1)(a) of the *Act*, the Applicant's normal reassessment period for that year expired on November 9, 2016. Accordingly, the Minister had until November 9, 2019 to reassess the Applicant's 2012 taxation year under subsection 152(4)(b)(iii) of the *Act*.

[31] Under subsection 152(4)(c) of the *Act*, the Minister may also reassess a taxation year at any time in respect of a Transfer Pricing Transaction if the taxpayer provides a waiver within the extended seven-year reassessment period referred to in subsection 152(4)(b)(iii):

Assessment and reassessment	**Cotisation et nouvelle cotisation**
152 (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	152 (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

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	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 pour l'année que dans les cas suivants:
[…]	[…]
(c) the taxpayer or person filing the return of income has filed with the Minister a waiver in prescribed form within the additional three-year period referred to in paragraph (b) or (b.1);	c) le contribuable ou la personne produisant la déclaration de revenu a présenté au ministre une renonciation, selon le formulaire prescrit, au cours de la période additionnelle de trois ans mentionnée aux alinéas b) ou b.1);

[32] The Applicant faxed a waiver to the Minister pursuant to subsection 152(4)(c) of the *Act* on September 20, 2019, before the seven-year reassessment period expired on November 9, 2019. Accordingly, the Minister has the authority to reassess the Applicant's 2012 taxation year at any time.

[33] While the Minister does not have discretion in determining liability under the *Act*, it does have discretion in deciding whether to reassess under subsection 152(4) of the *Act* (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 ("*JP Morgan*") at paras 78-79; *9027-4218 Québec Inc v Canada (National Revenue)*, 2019 FC 785

("*9027-4218 Québec Inc*") at para 74). The Minister may reassess a taxation year more than once (*Canada v Agazarian*, 2004 FCA 32 at para 33).

B. *Audits*

[34] Section 231.1 of the *Act* provides the Minister with the authority to audit taxpayers:

Inspections	**Enquêtes**
231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,	231.1 (1) Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois :
(a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, […]	a) inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi;

[35] The Minister's decision to audit under section 231.1 of the *Act* is also discretionary: it is the Minister's prerogative as to whether it will conduct an audit, and what form that audit will take (*Saipem Luxembourg S.A. v Canada (Customs and Revenue Agency)*, 2005 FCA 218 at para 34).

IV. Preliminary Issue: Nature of the Minister's Decision

[36] The parties disagree on the nature of the decision under review. The Applicant asserts the Minister decided not to reassess the Applicant's 2012 taxation year under subsection 152(4) of the *Act*, whereas the Respondent contends the Minister decided not to reopen the 2012 Audit under section 231.1 of the *Act*.

[37] In my view, the Minister's decision constitutes an exercise of discretion under each provision of the *Act*: the Minister's decision is both a decision not to reassess and not to audit. While the majority of the Minister's reasons are framed as a refusal to reopen the 2012 Audit, the Request Submissions concerned the Minister's authority to reassess the Applicant's 2012 taxation year under subsection 152(4) of the *Act*, which the Minister considered. Furthermore, the Applicant's stated purpose for requesting the Minister to reopen the 2012 Audit was to provide the Minister with additional information so that the Minister may reassess the Applicant's 2012 taxation year. In substance, these decisions are mutually inclusive: there was no reason to reassess without an audit, and *vice versa*.

V. Issue and Standard of Review

[38] The sole issue in this application for judicial review is whether the Minister's decision is reasonable, and in particular:

A. *Did the Minister fetter its discretion?*

B. *Is the Minister's decision justified in light of the additional information provided by the Applicant?*

C. *Is the Minister's decision justified in light of the relevant authorities?*

D. *Did the Minister reasonably rely upon the jurisprudence cited in its decision?*

[39] It is common ground between the parties that reasonableness is the applicable standard of review for the Minister's decision. I agree.

[40] Reasonableness is the presumed standard of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at para 10). This presumption is rebutted and a correctness standard applies in two instances: where required by legislative intent or by the rule of law (*Vavilov* at paras 10, 17). As neither of those instances apply in the case at hand, I find the Minister's decision to reassess under subsection 152(4) and to audit under section 231.1 of the *Act* is reviewed upon a standard of reasonableness (see *Zeifmans LLP v Canada (National Revenue)*, 2021 FC 363 at paras 17-19).

[41] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record

before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[42] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

VI. Analysis

A. *Did the Minister fetter its discretion?*

[43] In its decision, the Minister faulted the Applicant for not filing a waiver under subsection 152(4)(c) of the *Act* in a timely manner or seeking a Mutual Agreement Procedure under the *Cyprus Convention*:

> ACMSI did not file a waiver under subparagraph 152(4)(b)(iii) [*sic*] of the Act before the audit concluded nor before the reassessment date. ACMSI did not file a Notice of Objection for the Notice of Reassessment dated March 2, 2017. Lastly, ACMSI did not seek Mutual Agreement Procedure as described under Article 26 of the Treaty.

[44] According to the Applicant, a Mutual Agreement Procedure is a process by which a taxpayer can request the taxing authorities of Canada and Cyprus to resolve an issue of double taxation through agreement between those authorities.

[45] The Applicant submits neither filing a waiver before the 2012 Audit was concluded nor seeking a Mutual Agreement Procedure are requirements for the Minister to exercise its discretion under subsection 152(4) of the *Act*. Accordingly, the Applicant asserts the Minister fettered its discretion by relying on unfounded legal constraints, thus narrowing the scope of its discretion under subsection 152(4) of the *Act* in a binding manner (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 22).

[46] In my view, the Minister did not fetter its discretion.

[47] The Minister did not require the Applicant to file a waiver under subsection 152(4)(c) of the *Act* before the 2012 Audit was concluded or before the normal reassessment period expired. Rather, the Minister relied on the timing of the waiver as an example of how the Applicant did not act swiftly and prudently in objecting to the 2012 Reassessment. The Minister did not dispute it had the authority to reopen the 2012 Audit or reassess the Applicant's 2012 taxation year, nor did the Minister find the Applicant filed the waiver beyond a statutory limitations period. This interpretation is clear when the Minister's decision is read as a whole, as the thrust of the Minister's rationale is that the Applicant failed to act upon the numerous opportunities it had to object to the 2012 Reassessment.

[48] I am not convinced by the Applicant's argument that *Dorothea Knitting Mills Ltd v Canada (Minister of National Revenue)*, 2005 FC 318 ("*Dorothea Knitting*") is analogous to the case at hand. In that case, Justice Mactavish (as she then was) held the Minister fettered its discretion by refusing to grant the taxpayer an extension of time under subsection 220(2.1) of the

Act unless it met one of three criteria, none of which were conferred under that provision (*Dorothea Knitting* at para 25). In this case, the Minister did not rely on the filing of a waiver before the completion of the 2012 Audit as a requirement, but rather as an indicator of the Applicant's non-cooperation. I therefore find the Minister did not fetter its discretion under subsection 152(4) of the *Act*.

[49] The same conclusion applies with respect to the Applicant's argument that the Minister erred in faulting the Applicant for not seeking a Mutual Agreement Procedure under Article 26 of the *Cyprus Convention*. The Minister did not state that the Applicant was required to seek a Mutual Agreement Procedure, only that its failure to do so is yet another example of how the Applicant failed to engage with the 2012 Audit or object to the 2012 Reassessment in a timely manner. I therefore find the Minister relied on the Applicant's failure to seek a Mutual Agreement Procedure under the *Cyprus Convention* in a manner that does not fetter its discretion under subsection 152(4) of the *Act*.

B. *Is the Minister's decision justified in light of the additional information provided by the Applicant?*

[50] The Applicant submits the Minister knew the information it relied upon for the 2012 Reassessment was likely incorrect, as the Applicant provided the Minister with further information in March and April 2017 concerning its 2012 taxation year that the Minister could not have reviewed prior to issuing the 2012 Reassessment on March 2, 2017.

[51] Given this information, the Applicant asserts it was unreasonable for the Minister not to reopen the 2012 Audit and reassess the Applicant's 2012 taxation year. The Applicant relies upon *JP Morgan* and the authorities cited therein for the principle that the Minister must assess tax in a manner it knows accords with the relevant facts and law, and it has no discretion to do otherwise:

> [77] On occasion in the tax context, parties have alleged that the Minister abused her discretion in making an assessment. To date, all such claims have been dismissed as not being cognizable because in assessing the tax liability of a taxpayer, the Minister generally has no discretion to exercise and, indeed, no discretion to abuse. Where the facts and the law demonstrate liability for tax, the Minister must issue an assessment: *Galway v. Minister of National Revenue*, [1974] 1 F.C. 600 at page 602 (C.A.) ("the Minister has a statutory duty to assess the amount of tax payable on the facts as he finds them in accordance with the law as he understands it").
>
> [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": *Ludmer v. Canada*, 1994 CanLII 3547 (FCA), [1995] 2 F.C. 3 at page 17 (C.A.); *Harris v. Canada*, 2000 CanLII 15738 (FCA), [2000] 4 F.C. 37 at paragraph 36 (C.A.). This Court cannot stop the Minister from carrying out this duty: *Tele-Mobile Co. Partnership v. Canada (Revenue Agency)*, 2011 FCA 89 at paragraph 5 (in the context of the *Excise Tax Act*, R.S.C. 1985, c. E-15); *Ludmer*, *supra*, at page 9.
>
> [emphasis added]

[52] In my view, the Applicant's reliance on *JP Morgan* is misplaced. *JP Morgan* does not stand for the authority that the Minister is compelled to reassess under subsection 152(4) of the *Act* if it receives further evidence. Rather, the jurisprudence affirms that if the Minister assesses a taxpayer, the Minister must do so in accordance with its understanding of the law and facts, not

in manner it knows is incorrect (*Galway v Minister of National Revenue*, [1974] 1 FC 600 (FCA) at para 7; *JP Morgan* at para 79).

[53] The Applicant has failed to establish that the 2012 Reassessment was issued in a manner that the Minister knows is incorrect. While the Applicant asserts the additional information it provided to the Minister displays the 2012 Reassessment was determined on an incorrect factual basis, the Minister made no such finding. Further, the Applicant has not argued why the additional information it provided is so compelling that the Minister's decision not to reopen the 2012 Audit lacks justification.

[54] The Minister's decision is also justified in relation to the Applicant's history of non-cooperation (*Vavilov* at para 85). The Applicant failed to respond to several queries made by the CRA in early 2016, before Mr. Buchheit ceased communication with the CRA entirely in May 2016. In addition, Mr. Yaniv continued to rely on Mr. Buchheit after Mr. Yaniv learned of the CRA's outstanding requests upon receiving the DOJ Letter dated February 28, 2017. Despite being aware of numerous issues concerning the Applicant's cooperation with the CRA's audits, Mr. Yaniv did not directly contact the CRA to clarify whether the 2012 Audit was proceeding on-track or alter Mr. Buchheit's reporting protocols with the CRA. This lack of oversight led, in part, to Mr. Yaniv being unaware of the 2012 Reassessment until the limitation periods under the *Act* for objecting to that assessment had elapsed.

[55] The Applicant's argument is essentially that the Minister is compelled to reassess under subsection 152(4) of the *Act* if it receives evidence displaying a reassessment may be incorrect.

With respect, I find this argument is untenable. Inherent in discretion is the refusal to act, so long as that refusal is reasonable. In this case, the Applicant has not established the Minister's decision is unreasonable in light of the further evidence it provided, and the Minister reasonably relied upon the Applicant's non-cooperation as a ground for refusing to revisit an assessment with which the Applicant had ample opportunity to engage, but did not. I therefore find the Minister exercised its discretion in a manner that is justified, transparent, and intelligible (*Vavilov* at para 99).

C. *Is the Minister's decision justified in light of the relevant authorities?*

[56] The Applicant submits the Minister's decision is unreasonable in light of two cases: *Revera Long Term Care Inc v Canada (National Revenue)*, 2019 FC 239 ("*Revera*"), and *Abakhan & Associates Inc v Canada (Attorney General)*, 2007 FC 1327 ("*Abakhan*"). In addition, the Applicant asserts the Minister's decision is unreasonable in light of the CRA's *Information Circular 75-7R3* "*Reassessment of a Return of Income*" ("*Information Circular*"). I shall address each of these arguments respectively.

(1) *Revera*

[57] The Applicant asserts *Revera* is analogous to the case at hand. In *Revera*, the taxpayer over-reported its income for several years and therefore asked the Minister to reassess its taxes under subsection 152(4)(a)(i) of the *Act*, arguing those provisions permitted the Minister to reassess beyond the limitations period because its returns error was due to negligence. The Minister declined the Applicant's request because the Minister found it may only reassess under

subsection 152(4)(a)(i) if the taxpayer's negligence leads to under-reported income (*Revera* at para 1).

[58] The Court in *Revera* held the Minister's decision was unreasonable. In particular, the Minister provided no meaningful analysis to support its conclusion that it could not reassess taxation years under subsection 152(4)(a)(i) beyond the limitation periods for over-reported income, despite that this issue was of central and significant importance (*Revera* at para 23).

[59] I am not persuaded that *Revera* is analogous to the case at hand. The Minister in this case did not fail to address a central issue raised by the Applicant in the Request Submissions. Rather, the Minister accepted the Applicant's submission that it had the authority to reassess the Applicant's 2012 taxation year but refused to exercise that authority because the Applicant failed to cooperate with the 2012 Audit and object to the 2012 Reassessment.

(2) *Abakhan*

[60] Similar to *Revera*, the taxpayer in *Abakhan* overstated its income and sought a reassessment from the Minister under 152(4)(a)(i) of the *Act* for assessments the taxpayer could otherwise not appeal due to the applicable limitation periods (*Abakhan* at para 1). The Minister declined to reassess the taxpayer because it found there was insufficient information to determine the correct tax liability or conclude there was misrepresentation due to fraud (*Abakhan* at para 5). Justice O'Reilly held the Minister's decision was reasonable given the lack of information provided by the taxpayer (*Abakhan* at para 14).

[61] The Applicant asserts that, unlike the taxpayer in *Abakhan*, it has provided the Minister with information that the Minister should consider in determining the veracity of the 2012 Reassessment. This possibility, however, does not negate the fact that the Applicant, similar to the taxpayer in *Abakhan*, prevented a proper audit from being carried out through its mismanagement (*Abakhan* at para 5). In refusing to reopen the 2012 Audit, the Minister found the further information provided by the Applicant was insufficient in light of the Applicant's failure to adequately respond to the CRA during the 2012 Audit, object to the 2012 Reassessment, or request an extension for filing an objection. Absent a reviewable error in this determination, this Court must refrain from reweighing the evidence before the Minister (*Vavilov* at para 125).

(3) *Information Circular*

[62] Section 4 of the *Information Circular* applies to the Minister's decision to reassess under subsection 152(4) of the *Act*:

Reassessment to reduce tax payable	**Nouvelle cotisation visant à réduire l'impôt à payer**
4. A reassessment to create a refund ordinarily will be made upon receipt of a written request by the taxpayer, even if a notice of objection has not been filed within the prescribed time, provided that	4. Sur réception d'une demande écrite du contribuable, le Ministère établit ordinairement une nouvelle cotisation pour donner un remboursement, même si un avis d'opposition n'a pas été produit dans le délai prescrit, pourvu:
(a) the taxpayer has, within the four year filing period	a) que le contribuable ait produit la déclaration de

required by subsection 164(1), filed the return of income;	revenu dans le délai de quatre ans mentionné au paragraphe 164(1);
(b) the Department is satisfied that the previous assessment or reassessment was wrong;	b) que le Ministère soit convaincu que la cotisation ou nouvelle cotisation précédente était inexacte;
(c) the reassessment can be made within the four year period or the seven-year period, as the case may be, referred to in paragraph 1 above or, if that is not possible, the taxpayer has filed a waiver in prescribed form;	c) qu'il soit possible d'établir une nouvelle cotisation dans le délai de quatre ans ou de sept ans, selon le cas, dont il est fait mention au numéro 1 précédent ou, s'il n'est pas possible de remplir cette condition, que le contribuable ait produit une renonciation en la forme prescrite;
(d) the requested decrease in taxable income assessed is not based solely on an increased claim for capital cost allowances or other permissive deductions, where the taxpayer originally claimed less than the maximum allowable; and	d) que la réduction du revenu imposable établi ne résulte pas uniquement d'une majoration des déductions pour amortissement ou d'autres déductions laissant une marge de manoeuvre au contribuable, lorsque ce dernier a demandé au départ une déduction inférieure au maximum déductible; et
(e) the application for a refund is not based solely upon a successful appeal to the Courts by a taxpayer.	e) que la demande de remboursement ne se fonde pas uniquement sur un appel devant les tribunaux d'un autre contribuable ayant eu gain de cause.
[emphasis added]	[emphase ajoutée]

[63] The Applicant asserts the criteria in the *Information Circular* are satisfied in the case at hand. In particular, the Applicant notes its request was timely, not based on claiming permissive

deductions, and not based on a successful appeal. With respect to the Minister's knowledge under criterion (b), the Applicant asserts the Minister ought to have been concerned that the 2012 Reassessment was based on incomplete information given the Applicant's provision of further information in March and April 2017. In addition, the Applicant notes the Minister vacated its reassessment of the Applicant's 2011 taxation year, insinuating there may be flaws in the Minister's audits.

[64] Even accepting that the criteria in the *Information Circular* are satisfied, I nonetheless find the Minister's decision is reasonable. The *Information Circular* outlines the circumstances in which the Minister will ordinarily reassess under subsection 152(4) of the *Act*. In this case, the Minister justified its decision to refuse the Applicant's request despite that the ordinary preconditions for the Minister to accept such a request were met. Again, the Minister considered how the Applicant's actions resulted in the situation in which the Applicant currently finds itself, and the Minister thus reasonably refused to reassess under subsection 152(4) of the *Act*.

D. *Did the Minister reasonably rely upon the jurisprudence cited in its decision?*

[65] The Applicant asserts the Minister unreasonably relied upon *Cal Investments* and *Holmes* in its decision. I shall address each of these arguments respectively.

(1) *Cal Investments*

[66] In *Cal Investments*, Justice Joyal stated at paragraph 44 that "the Crown requests a waiver so that it may continue its assessment or audit work in a normal administrative mode without

having to worry about limitations." Relying on *Cal Investments*, the Minister stated in its decision that all audit activity for the Applicant's 2012 taxation year was "completed in a normal administrative mode that concluded in 2017."

[67] I am not persuaded by the Applicant's argument that the Minister misconstrued the legal effect of the phrase "normal administrative mode" or incorrectly applied it as jurisprudential authority. In my view, the Minister relied on the phrase to emphasize that the 2012 Audit was completed in a normal timeframe using normal protocol. The Minister does not attach any legal significance to the phrase, nor do any of the Minister's findings turn upon it. Instead, the Minister merely relies upon on *Cal Investments* to describe the nature and purpose of waivers — a usage that directly aligns with Justice Joyal's reasoning (*Cal Investments* at paras 44-45).

(2) *Holmes*

[68] The Minister also relied upon Sheridan TCJ's statement in *Holmes* at paragraph 20 for the notion that "the power to accept the waiver lies exclusively with the Minister…" The Minister did not explain its interpretation of this principle or otherwise rely on *Holmes* in its decision; the Minister cited *Holmes* in isolation.

[69] The Applicant asserts the statement in *Holmes* conflicts with Sexton JA's finding in *Mitchell v Canada*, 2002 FCA 407 ("*Mitchell*"), that the Minister must accept a waiver if filed:

> [40] It seems to me that Revenue Canada is obliged to treat any document as a waiver, providing it contains the necessary information. Revenue Canada does not have an option as to

> whether or not to accept a waiver. A waiver is a privilege which a taxpayer has, and, if sent, Revenue Canada cannot disregard it.

[70] The sole issue to be determined in *Mitchell* was whether there was an effective waiver provided by the appellants and, if so, whether the Minister erred in not accepting it (*Mitchell* at para 25; *Kerry (Canada) Inc v Canada (Attorney General)*, 2019 FC 377 at paras 44-47).

[71] I am not convinced the above statement in *Holmes* conflicts with the above statement in *Mitchell*. At issue in *Holmes*, among other things, was whether the taxpayer's waiver had in fact been "filed" with the Minister within the meaning of subsection 152(4)(a)(ii) of the *Act*, which was the Minister's onus to prove (*Holmes* at paras 1-4). It was within the context of the Minister's obligation to accept a waiver that Sheridan TCJ stated "the power to accept the waiver lies exclusively with the Minister…" (*Holmes* at paras 20).

[72] In other words, I do not understand *Holmes* as standing for the authority that the Minister has the power to <u>not</u> accept a waiver if filed. This interpretation is clear when *Holmes* is read as a whole, in particular the paragraph preceding Sheridan TCJ's impugned statement:

> [19] Counsel for the Respondent argued that the waiver must be construed against it author; even though Mr. LeDuc drafted the original version, its subsequent amendment by Mrs. Holmes' accountants shifted the burden of any resulting ambiguity to her shoulders. In a civil contractual context with parties on an equal footing, this argument might have some merit; but under the scheme of the *Income Tax Act*, where <u>the authority and duty to prescribe the form of the waiver, to determine whether its subject matter had been properly set out and whether to accept it as "filed" rests exclusively with the Minister</u>, the *contra proferentum* rule has no application.

[emphasis added]

[73] In my view, the Minister relied on *Holmes* for the notion that the power to act upon (*i.e.*, "accept") a waiver, and in turn reassess taxes, lies exclusively within the Minister's discretion. It is clear from the decision that the Minister did not find it could disregard the Applicant's waiver, but rather refused to reassess the Applicant's 2012 taxation year notwithstanding that waiver.

[74] I accept that the Minister's reliance on *Holmes* is somewhat misplaced, as *Holmes* concerned the Minister's acceptance of a waiver as "filed" under subsection 152(4)(a)(ii) of the *Act*, not its ability to reassess in light of a waiver under subsection 152(4)(c). However, the principle that the Minister extrapolated from *Holmes* nonetheless accords with the *Act*, as the Minister's decision to carry out a reassessment under subsection 152(4) of the *Act* is discretionary (*9027-4218 Québec Inc* at para 74).

[75] In light of the above, I find the Minister's reliance on *Holmes* is not a flaw that is sufficiently central or significant to render its decision unreasonable (*Vavilov* at para 100). The Minister's reliance on *Holmes* does not disrupt the Minister's rational chain of analysis, and the Minister's decision is otherwise justified in relation to the relevant law (*Vavilov* at para 85).

VII. Costs

[76] The parties agree that an appropriate amount of costs is $5,000, inclusive of tax and disbursements. Having found the Respondent successful in dismissing this application, I award the Respondent $5,000 in costs.

VIII. Conclusion

[77] This application for judicial review is dismissed with costs, which the parties have agreed should be set at $5,000. The Minister reasonably relied on the Applicant's history of non-compliance and its decision is justified in light of the relevant facts and law, including the relevant jurisprudence, the *Information Circular*, and the *Cyprus Convention*.

JUDGMENT IN T-2070-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. The Applicant shall pay the Respondent $5,000 in costs forthwith.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2070-19
STYLE OF CAUSE:	AMDOCS CANADIAN MANAGED SERVICES INC. v THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN TORONTO AND OTTAWA, ONTARIO
DATE OF HEARING:	MAY 11, 2021
JUDGMENT AND REASONS:	AHMED J.
DATED:	JULY 5, 2021

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