Federal Court  Cour fédérale

Date: 20240730

Docket: T-2407-23

Citation: 2024 FC 1210

Ottawa, Ontario, July 30, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ADAM RAFFAELE MATTINA

Applicant
(Responding Party)

and

THE MINISTER OF NATIONAL REVENUE

Respondent
(Moving Party)

ORDER AND REASONS

I. Overview

[1] The Respondent, the Minister of National Revenue ("Minister"), brings a motion to strike the Applicant's underlying application for judicial review regarding the Canada Revenue Agency's ("CRA") reassessments of the 2013, 2014, and 2017 taxation years (the "Reassessments").

[2] For the following reasons, this motion is granted. The application for judicial review is struck.

II. **Facts**

[3] The following facts are those as found in *Mattina v Canada (National Revenue)*, 2024 FC 431 ("*Mattina 1*"), facts that I am assuming to be true for the purposes of this motion.

[4] In June 2018, the Applicant was audited for the taxation years in 2014, 2015, and 2016. In October 2018, he was audited for the 2013 tax year. In July 2021, the Respondent issued notices of reassessment for the 2013, 2014, and 2017 tax years and in November 2021, the Respondent issued a further notice of reassessment for the 2013 tax year.

[5] In October and December 2021, respectively, the Applicant filed objections (the "Objections") to the Reassessments pursuant to section 165 of the *Income Tax Act*, RSC 1985, c 1 (5th supp.) ("*ITA*").

[6] In November 2022, the Objections were assigned to an Appeals Officer at the CRA. The Appeals Officer provided the Applicant with preliminary views about the Objections in January and February 2023. In September 2023, the Applicant had a meeting with the Appeals Officer and CRA Appeals Management to discuss his file. He states that the meeting ended on a "positive note," being informed that "a revised recommendation letter would be forthcoming."

[7] In October 2023, the Applicant was advised that the Appeals Division had referred the Objections to the Audit Division of the CRA (the "Referral"), "due to the substantial amount of information received at the objections stage… [and] to the substantial amount of 'new' information provided at the objection stage, the fact that the Appeals Division of the CRA does not perform audit work, and that the Referral was 'mandatory'." The Applicant states that the Referral was made "instead of issuing a revised recommendation letter and proceeding to vacate, confirm, or vary the Reassessments."

[8] The Applicant's underlying application for leave and judicial review seeks a number of forms of relief, including:

- an order compelling the Minister to reconsider and vacate, vary, or confirm the Reassessments with all due dispatch;
- a declaration that the Minister has no authority to not reconsider and vacate, vary, or confirm the Reassessments;
- a declaration that the Minister has no authority to not reconsider and vacate, vary, or confirm the Reassessments so as to permit the Audit Division to perform additional audit work;
- a declaration that the Minister has no power to further delegate auditing powers under section 165(3) of the *ITA* to further delegate auditing powers in respect of the Objections;
- a declaration that the Minister fettered discretion by making the Referral;
- a declaration that the Referral is the product of unfairness and is a nullity;
- a declaration that the Referral is unreasonable;

- a declaration that the Minister or her delegates, has no authority to pursue any goals related to the Objections other than those related to taking the required action under section 165(3) of the *ITA* without inappropriately relying on irrelevant considerations including the further opinion of the Audit Division;

- quashing the Referral; and

- prohibiting the Minister from acting on the details of the Referral and making any further referrals in relation to the Objections.

[9] On July 11, 2024, I issued a direction to the parties to give them the opportunity to provide updated submissions on the Supreme Court of Canada's recent decisions in *Dow Chemical Canada ULC v Canada*, 2024 SCC 23 ("*Dow*") and *Iris Technologies Inc v Canada*, 2024 SCC 24 ("*Iris*"). Both parties provided updated submissions. I have reviewed them for the purposes of this decision.

III. **Issue**

[10] The sole issue in this motion is whether it is plain and obvious that the Applicant's notice of application is "so clearly improper as to be bereft of any possibility of success" (*JP Morgan Asset Management (Canada) Inc. v Canada (National Revenue)*, 2013 FCA 250 ("JP Morgan") at para 47 [citation omitted]).

IV. **Analysis**

[11] The Federal Court of Appeal has provided three "obvious, fatal" flaws that justify striking an application for judicial review: (1) a notice of application does not provide a

cognizable administrative law claim that the Federal Court can hear; (2) an administrative law claim cannot be dealt with by the Federal Court's jurisdiction under section 18.5 of the *Federal Courts Act*, RSC 1985, c F-7 (the "Act") or another legal principle; or (3) the relief that is sought cannot be granted (*JP Morgan* at para 66).

[12] I am mindful of the fact that striking a notice of application has a high threshold (*JP Morgan* at paras 47-48) and that cases striking such a notice "must be very exceptional" (*David Bull Laboratories (Canada) Inc v Pharmacia Inc (C.A.)*, [1995] 1 FC 588, 1994 CanLII 3529 (FCA) at 600). I am also mindful, however, of the fact that striking meritless applications promotes the expeditious and summary nature of applications for judicial review (*JP Morgan* at para 48).

[13] The Respondent submits that the Applicant's application suffers from all of these flaws. The Respondent submits that, overall, the application is an attack on the tax audit and assessment process.

[14] The Applicant submits that his application does not suffer from any of these fatal flaws. The Applicant maintains that the Respondent has mischaracterized the nature of the Applicant's application, the application being about the Court supervising the Minister's conduct throughout the audit proceedings.

(a) *The nature of the application*

[15] The Respondent submits that the nature of the Applicant's application is an attempt to prevent the Audit Division from assisting the Minister in completing an accurate assessment of the Applicant's 2013, 2014, and 2017 tax years.

[16] The Applicant maintains that at the heart of his application is, within the objection process, "whether the Minister has acted with all due diligence and in an administratively fair manner."

[17] I agree with the Respondent.

[18] The Court must read a notice of application, in these motions, "with a view to understanding the real essence of the application" (*JP Morgan* at para 49). The Applicant frames the requests in his notice of application as arguments about the Minister's authority, audit, delegation, and discretionary powers, as well as concerns about procedural unfairness.

[19] The essence of the Applicant's notice of application is that the Applicant is seeking that the Minister make a decision about the Reassessments without assistance from any other bodies in the CRA *(e.g.*, the Audit Division) and without regard to any procedures in the CRA for assisting the Minister in making this decision *(e.g.*, the Audit Division's report). This is clear from the bulk of the forms of relief sought, as well as the grounds stating that the Appeals Division ought to make a decision, rather than the Audit Division. The other forms of relief,

premised upon allegations of procedural fairness, are vague and unsubstantiated, as will be discussed below.

[20] I therefore agree with the Respondent's characterization of the Applicant's notice of application, namely, that the Applicant's application is seeking to interfere with the tax assessment process.

(b) *Cognizable administrative law claims*

[21] The Respondent submits that the Referral is not subject to judicial review under the Act because it, as well as other administrative decisions where the Minister seeks out information to assess the Applicant's taxes, do not directly affect the Applicant.

[22] The Applicant submits that the Respondent, by collapsing the assessment and auditing process, misses that the audit process can attract judicial review under the Act, given that it bears out legal consequences (*Rosenberg v Canada (National Revenue)*, 2015 FC 549 ("*Rosenberg 1*") at para 56 and *Rosenberg v Canada (National Revenue)*, 2016 FC 1376 ("*Rosenberg 2*") at para 1). The Applicant further submits that his application has "nothing to do with the correctness of tax assessments," that the jurisprudence the Respondent relies on is distinguishable, and that the Respondent fails to address the Applicant's submissions regarding the Minister acting with all due dispatch and the allegations of procedural fairness, as well as the delegation and *vires* claims. Additionally, the Applicant maintains that a CRA policy in question is amenable to judicial review.

[23] I agree with the Respondent. I address each of the Applicant's arguments in turn.

[24] First, in my view the *Rosenberg* decisions are both distinguishable from this matter. They involved the validity of an "agreement" between the CRA and the applicant (*Rosenberg 1* at paras 11-12, 39; *Rosenberg 2* at paras 13-14). No such agreement exists in this matter, nor anything similar that would see the administrative law principles from the *Rosenberg* decisions affect this matter.

[25] I am aware of the Court's statement that "the decision to undertake an audit and to request documents and information in the context of that audit constitutes a 'matter' within the meaning of subsection 18.1(1) of the [Act], in respect of which an application for judicial review may be made" (*Rosenberg 1* at para 56). However, my reading of this holding is that it was made in the context of an audit and its attendant information gathering, despite an agreement between the CRA and the applicant in that matter that the CRA would not issue a reassessment of certain tax years (*Rosenberg 1* at paras 55, 57). Again, no such agreement exists here.

[26] Second, I agree with the Respondent that for the purposes of judicial review, the Applicant is not directly affected by the Referral. The Court has affirmed that the reassessment is not reviewable until a notice of reassessment is sent and unless a notice of objection is filed within the time prescribed by statute, "unless the Tax Court grants the taxpayer an extension" (*Neeb v R*, [1991] 1 CTC 41, 1990 CarswellNat 500 (FCTD) ("*Neeb*") at para 22). Once this notice of reassessment is issued, the Applicant can appeal to the Tax Court (*Kerry (Canada) Inc.*

v Canada (Attorney General), 2019 FC 377 at para 33 [citations omitted], cited with approval in *Laurent v Canada (Attorney General)*, 2023 FC 1439 at para 19).

[27] The Applicant seeks to distinguish *Neeb* on the basis that it was a decision regarding whether the Minister was bound by a previous indication on how to reassess a notice of assessment.

[28] However, while that formed part of the decision in *Neeb*, the Court in *Neeb* stated that "a reassessment is a process undertaken by the Minister that culminates in a notice of reassessment. The process is not reviewable until the notice is sent to the taxpayer and it is only reviewable if a notice of objection is filed by the taxpayer within a statutorily prescribed period of time unless the Tax Court grants the taxpayer an extension" (*Neeb* at para 22). As the Supreme Court of Canada recently held, an "assessment" in taxation law is a product, not a process (*Dow* at para 6 [citations omitted]).

[29] That said, the assessment process can be reviewable in this Court prior to a notice of assessment if an applicant has established a lack of *vires* or procedural unfairness, as the Applicant claims in the case here (*JP Morgan* at para 70). This Court can grant declarations on tax matters via administrative law principles (*Dow* at para 106 [citations omitted]), and the Tax Court cannot "vacate assessments on the basis of the wrongdoing of the minister" nor entertain objections about the "underlying process or motivations for the issuing of an assessment" (*Dow* at para 57 [citations omitted]).

[30] Additionally, albeit with reference to a different statutory scheme, "[f]acts underlying the Minister's exercise of discretion are unconnected to the correctness of the assessment" (*Dow* at para 60 [citation omitted]). The Supreme Court recently held that "[n]otwithstanding the issuance of a tax assessment, the Federal Court has the exclusive jurisdiction to conduct judicial review over discretionary decisions delegated to the Minister by Parliament, including those that directly affect tax liability" (*Iris* at para 7).

[31] The question thus remains as to whether there has been discretionary decision made by the Minister that is amenable to being judicially reviewed, as per *Dow* and *Iris*. As noted above, following *Neeb*, I do not find that such a decision has been made. Specifically, I am not persuaded that the Applicant's rights have been affected, legal obligations imposed, or a legal consequence been enacted (*Tuquabo v Canada (Attorney General)*, 2024 FCA 111 at para 4 [citations omitted]). Following my decision in *Mattina 1*, the Applicant has not established a serious issue with respect to the issues of *vires* or procedural fairness (paras 12-17). Even taking all of the facts pleaded as true, the Applicant's submissions on this point do not succeed, as will be discussed below. The Reassessments appear to not have been vacated, confirmed, or varied. As I held earlier, the Applicant's claim amounts to seeking to interfere with the tax assessment process. No discretionary decision under the *ITA* has been made, in my view, that has seen the Applicant's rights affected or a legal consequence effected such that judicial review of this matter is appropriate at this time.

[32] Finally, I disagree with the Applicant's submission regarding the CRA policy. It is true that policies can be challenged on judicial review as unlawful or unconstitutional (*May v*

CBC/Radio Canada, 2011 FCA 130 at para 10, citing *Sweet v Canada* (1999), 249 NR 17). However, the Applicant's notice of application does not contain challenges to this policy, other than mentioning that the CRA did not follow its own policies. The Applicant's submission regarding this policy with respect to his notice of application therefore does not form a cognizable administrative law claim for the purposes of this motion.

[33] For these reasons, I find that the Applicant's notice of application does not provide a cognizable administrative law claim that the Court can hear. This finding is determinative of this matter. Nonetheless, I have considered the remaining flaws as alleged by the Respondent.

(c) *The Federal Court's jurisdiction and adequate recourse*

[34] The Respondent submits that section 18.5 of the Act precludes judicial review in these circumstances, the Applicant seeking to have the Court assist him in circumventing the tax assessment system provided for by Parliament. The Respondent further submits that the Applicant has adequate recourse outside of judicial review, the Applicant charging this Court with the same task the Tax Court would be tasked with.

[35] The Applicant submits that judicial review is not precluded, the notice of application seeking review of the Minister's conduct in this matter, rather than the correctness of the assessment. The Applicant maintains that the Tax Court is an inappropriate forum of review for this matter; thus, he has not exhausted his avenues of recourse.

[36] I agree with the Respondent.

[37] To the extent that the notice of application challenges the Minister's failure to act with all due dispatch, the Federal Court of Appeal has been clear: "the Minister's failure to act 'with all due dispatch' is not a basis for overturning an assessment; the taxpayer's remedy is to appeal directly to the Tax Court under paragraph 169(1)(*b*) of the [*ITA*]:" (*Rafique v Canada (National Revenue)*, 2024 FCA 37 at para 7, citing *Ford v Canada*, 2014 FCA 257 at para 19, (in turn citing *Bolton v R.*, 1996 CanLII 21607 (FCA), [1996] 3 CTC 3, 200 NR 303)). This Court therefore has no jurisdiction to deal with the Reassessments with respect to the Applicant's grounds regarding the Minister acting with all due dispatch, pursuant to section 18.5 of the Act.

[38] To the extent the notice of application challenges the procedural aspects of the Minister rendering the decision, the Tax Court cannot "set aside an assessment on the basis of reprehensible conduct by the Minister leading up to the assessment, such as abuse of power or unfairness" (*JP Morgan* at para 83 [citations omitted]; *Dow* at para 57). This Court can also hear judicial review in, for example, "discretionary decisions under the fairness provisions, assessments that are purely discretionary, […] and conduct during collection matters that is not acceptable or defensible on the facts and the law" (*JP Morgan* at para 96 [citations omitted]).

[39] However, I cannot accept the proposition that one can simply allege that there has been a breach of procedural fairness or unacceptable/indefensible conduct in a tax matter in order to launch an application for judicial review in the Federal Court, rather than bring the matter to the Tax Court. This is especially so when, as here, the notice of application has been characterized as an attempt to interfere with the tax assessment process. This would be the exact form of

"incidental litigation designed to circumvent the system of tax appeals" that the Supreme Court of Canada warned of (*Canada v Addison & Leyen Ltd*, 2007 SCC 33 at para 11).

[40] In my view, the facts provided by the Applicant to support his allegations of procedural fairness amount to a fishing request (*JP Morgan* at para 42). The Federal Court of Appeal in *JP Morgan* provided the following:

> Thus, for example, it is not enough to say that an administrative decision maker "abused her discretion". The applicant must go further and say what the discretion was and how it was abused. For example, the applicant should plead that "the decision-maker fettered her discretion by blindly following the administrative policy on reconsiderations rather than considering all the circumstances, as section Y of statute X requires her to do". (at para 43).

[41] With respect, the Applicant has not "gone further" in his allegations of procedural unfairness. The Applicant provides little to support the submission that the Referral "is the product of procedural unfairness, a breach of natural justice, and is a nullity," aside from vague statements about an auditor "effectively" closing her mind due to the time spent on the file and her responsibilities, not providing the Applicant an opportunity to make submissions regarding the Referral, "excessive delay," and general references to bias. In my view, I do not find that the facts plead, assumed as true, form grounds for a substantiated argument about procedural fairness. I find this especially true given the austerity of the ground stating that there had been a breach of procedural fairness (*JP Morgan* at para 42).

[42] Thus, I cannot hold that the Federal Court could not have jurisdiction over a notice of application alleging procedural defects in the tax auditing and assessment process. However, I

will hold that the Federal Court does not have jurisdiction over this notice of application, as it does not disclose the material facts such that the application ought to be entertained in this Court. This is the second fatal flaw in the Applicant's notice of application.

(d) *The relief sought*

[43] The Respondent submits that the Court cannot provide the relief sought. The Respondent submits that the Court cannot vacate, vary, or confirm an assessment, nor do indirectly what it cannot do directly. The Respondent submits that issuing a remedy under section 18.1 of the Act would interfere with the Minister exercising powers granted by Parliament (*Ghazi v Canada (National Revenue)*, 2019 FC 860 ("*Ghazi*")).

[44] The Applicant submits that the Court can provide the relief sought. The Applicant maintains that the Court can direct the Minister to vacate, vary, or confirm an assessment, without specifying which. The Applicant submits that the fact the Minister shall administer and enforce the *ITA* does not bar the Court from intervening, and that the Respondent's reliance on jurisprudence stating that the Court cannot intervene in the audit and assessment process is misguided.

[45] I agree with the Respondent in part.

[46] The bulk of the relief sought in this matter is declarations. The Court cannot grant these declarations, as they would not, in my view, serve any "practical utility," as "[i]ssuing a

declaration that does not quash or vacate the assessments would serve little or no purpose" (*Iris* at para 58 [citation omitted]). This alone would suffice to strike this application.

[47] But as stated above, this Court can review procedural defects in the tax assessment process and conduct judicial review of discretionary decisions made by the Minister during the tax assessment process (*JP Morgan* at para 70; *Dow* at para 106; *Iris* at para 7).

[48] However, albeit in a case involving the *Excise Tax Act*, RSC 1985, c E-15 ("*ETA*"), my colleague Associate Chief Justice Gagné has discussed *mandamus* and prohibition in conducting assessments. She provided a holding that I adopt in its entirety:

> … 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. (*Ghazi* at para 59, citing *JP Morgan* at para 78, *Canada Revenue Agency v Tele-Mobile Company Partnership*, 2011 FCA 89 at paras 4-5, and *ColasCanada Inc v Canada (National Revenue)*, 2014 FC 452 at para 29).

[49] Thus, the Court cannot grant the relief that the Applicant seeks with respect to the orders regarding the Minister acting with all due dispatch. This too is a fatal flaw in the Applicant's application for judicial review. The Court cannot grant the relief sought by the Applicant in this matter.

V. **Conclusion**

[50] The Respondent's motion is granted with costs. The Applicant's application for judicial review is struck.

ORDER in T-2407-23

THIS COURT ORDERS that:

1. The Respondent's motion is granted with costs.

2. The Applicant's underlying application for judicial review is struck.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2407-23
STYLE OF CAUSE:	ADAM RAFFAELE MATTINA v THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 29, 2024
ORDER AND REASONS:	AHMED J.
DATED:	JULY 30, 2024

APPEARANCES:

Adam Mattina	FOR THE APPLICANT, RESPONDING PARTY
Christopher VanBerkum	FOR THE RESPONDENT, MOVING PARTY

SOLICITORS OF RECORD:

Adam R. Mattina Barrister and Solicitor Ancaster, Ontario	FOR THE APPLICANT, RESPONDING PARTY
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT, MOVING PARTY