Federal Court Cour fédérale

Date: 20140521

Docket: T-615-13

Citation: 2014 FC 486

Ottawa, Ontario, May 21, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

RANDALL SULLIVAN

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision rendered by a delegate for the Minister of National Revenue [Minister], made on March 15, 2013, under subsection 152(4.2) of the *Income Tax Act*, RSC (1985) c 1 (5th Supp), [Act]. The Minister partly denied the applicant's request for taxpayer relief and reassessment of the employment expenses he had claimed for the 2002 and 2003 taxation years.

[2] For the reasons discussed below, this application for judicial review will be dismissed.

Background

[3] As a result of an audit in 2005, the applicant was reassessed for his 2002 and 2003 taxation years to include, among other things, unreported T4A income from Steelmatic Wire Inc [Steelmatic] in the amounts of $26,403 and $76,847, respectively. Commission expenses of $20,375 were disallowed for the 2003 taxation year as no documentation was provided to support the claimed amount.

[4] The applicant objected to the reassessment by Notice of Objection dated October 17, 2005.

[5] Meanwhile, on July 4, 2005, a ruling was required from EI/CPP Rulings to determine the applicant's status with Steelmatic for those same years. The applicant was found to be an employee of Steelmatic, having insurable and pensionable employment, rather than an independent contractor. Steelmatic appealed the ruling decision, but it was confirmed on March 3, 2006.

[6] As a result, Steelmatic issued T4 slips showing income in the amounts of $24,250 and $39,683 respectively, to replace the previous T4A slips, and the applicant's income was reassessed for the 2002 and 2003 taxation years accordingly.

[7] The applicant filed a second Notice of Objection, which was also rejected. He appealed that decision to the Tax Court of Canada but subsequently withdrew his appeal.

[8] On January 10, 2008, the applicant filed T1 adjustment requests, which were treated as Taxpayer Relief requests pursuant to subsection 152(4.2) of the Act, as taxation years 2002 and 2003 were by then statute-barred.

[9] The applicant requested a second level review, which was dismissed. He applied for judicial review of that decision but the application was subsequently withdrawn, as the matter was remitted back to the Minister on consent.

[10] During the third administrative review of the applicant's taxpayer relief request conducted by the Minister, the following facts were considered:

1. On his Rev99 form, the applicant indicated that Steelmatic did not require him to have his own office away from the employer's premises, contrary to subsection 8(13) of the Act which requires either that the taxpayer principally performs the duties of office or employment in the home office, or that the home office is used on a regular and continuous basis to meet with customers or clients;
2. On the same form, the applicant stated he was reimbursed for expenses upon submitting expense sheets;
3. The T2200 form (Declaration of Employment) submitted by the applicant has not been completed and signed by an authorized officer of Steelmatic, but rather by the applicant himself; and

4. The information provided on the T2200 form was inconsistent with what the applicant himself had represented in his description of his conditions of employment on the Rev99 form. For example, on the T2200 form the applicant indicated that he was normally required to work away from the employer's place of business. However, on the Rev99 form, the applicant stated that he was working 5 days a week from 8:30 am to 5:00 pm at the employer's office.

[11] The applicant's Taxpayer Relief requests were partly allowed for items that are not at stake in this application for judicial review, but denied with respect to his claimed employment expenses for 2002 and 2003, as well as the related GST rebate for 2002.

Issues and Standard of Review

[12] This application for judicial review raises the following issue:

> *Whether the Minister erred in the exercise of the discretion conferred under subsection 152(4.2) of the Act when he only partly allowed the applicant's request for reassessment of his 2002 and 2003 taxation years.*

[13] In his memorandum of fact and law, the applicant also argues that the Minister failed to observe the principles of natural justice and procedural fairness. However, he does not indicate what that breach would be and his counsel barely addressed that issue in reply, during his oral submissions.

[14] The sole issue then raised in this application for judicial review is subject to the standard of reasonableness (*Lanno v Canada (Customs and Revenue Agency),* 2005 FCA 153; *Canada (Attorney General) v Abraham,* 2012 FCA 266 at para 49; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). As emphasized by the respondent, the Minister's discretion is wide and policy based, and so is owed considerable deference.

Statutory Framework

[15] The relevant provision of the Act is the following:

Reassessment with taxpayer's consent	Nouvelle cotisation et nouvelle détermination
152.(4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining, at any time after the end of the normal reassessment period of a taxpayer who is an individual (other than a trust) or a testamentary trust in respect of a taxation year, the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is ten calendar years after the end of that taxation year,	152.(4.2) Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable — particulier, autre qu'une fiducie, ou fiducie testamentaire — pour une année d'imposition le remboursement auquel le contribuable a droit à ce moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année en vertu de la présente partie, le ministre peut, si le contribuable demande pareille détermination au plus tard le jour qui suit de dix années civiles la fin de cette année d'imposition, à la fois :
(*a*) reassess tax, interest or penalties payable under this Part by the taxpayer in	*a*) établir de nouvelles cotisations concernant l'impôt, les intérêts ou les

respect of that year; and	pénalités payables par le contribuable pour l'année en vertu de la présente partie;
(*b*) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.	*b*) déterminer de nouveau l'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année ou qui est réputé, par le paragraphe 122.61(1), être un paiement en trop au titre des sommes dont le contribuable est redevable en vertu de la présente partie pour l'année.

Analysis

[16] The applicant submits that the Minister exercised his discretion in an unreasonable manner that cannot withstand probing examination as well as based his conclusion upon erroneous findings of fact made capriciously and without regard for the material before him. As such, his decision should be overturned. No further detail is provided in the applicant's memorandum of fact and law. At the hearing, the applicant was more specific and added that the Minister erroneously found that i) an adjustment of his 2002 and 2003 assessments would increase his revenues for those years; ii) the applicant did not encounter employment expenses during years 2002 and 2003; and iii) the applicant was not justified to claim home office expenses for the same years.

[17] As for the respondent, he maintains that the decision is reasonable and that the Minister's delegate properly exercised his discretion. In doing so, the Minister reviewed the taxpayer relief request and all documents submitted in support thereof. The respondent argues that the applicant is not seeking a tax benefit he otherwise would have been entitled to if he had claimed it within the regular reassessment period. Rather his claim for employment expenses was previously denied by the Audit and Appeals divisions of the Canada Revenue Agency and the Applicant chose to withdraw his appeal to the Tax Court of Canada. Subsection 152(4.2) of the Act is not intended to be an alternative mechanism through which to challenge issues (see Information Circular 07-1-Taxpayer Relief Provisions at para 73).

[18] The respondent further argues that the applicant cannot establish that he is legally entitled to the expenses he seeks to claim. His evidence in support of his claim is, at best, contradictory and self-serving. For this last point, the respondent points to the applicant's cross-examination when he was asked to explain discrepancies in his position regarding his employment status.

[19] During the hearing, counsel for the applicant attempted to bring the debate back to the issue of whether the applicant should have been considered, for the relevant period, an employee of Steelmatic or an independent contractor. However, this Court is bound by the previous finding on that issue. The issues then of whether Steelmatic deducted income tax at source or whether the applicant consulted for a few clients on the side (and from which, I note, he received a small percentage of his total revenues), were not relevant for the Minister's assessment of the expenses claimed from his principle employment at Steelmatic.

[20] As an employee, the applicant had to file the T2200 Declaration of Employment duly signed by an authorized representative of Steelmatic, along with the Rev99 form, in order to convince the Minister that his general expenses and home office expenses met the requirements set out in paragraphs 8(1)(*h*) and 8(1)(*h*.1) and subsection 8(13) of the Act.

[21] The applicant invokes the fact that, by that time, his relation with Steelmatic had deteriorated to such an extent that it justified him signing the T2200 Declaration of Employment in lieu of Steelmatic's representative. Even if the Minister's delegate knew of the difficulties encountered by the applicant in obtaining a T2200 Declaration of Employment signed by his former employer, it was reasonable for him not to accept an incomplete document.

[22] It was also reasonable for the Minister, considering all of the contradictions and inconsistencies between the T2200 form (Declaration of Employment) and the Rev99 form, to find that the applicant's conditions of employment did not include the obligation for him to pay for his claimed expenses or to use part of his residence as his main office. The Minister's exercise of his discretion was reasonable, particularly considering the fact that the applicant withdrew his appeal before the Tax Court of Canada, and the fact that he had had several occasions to provide convincing and consistent evidence that he met the requirements of the Act.

Conclusion

[23] The applicant has not convinced the Court that its intervention is warranted and this application for judicial review will be dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed; and

2. Costs are granted in favour of the respondent.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Dale Barrett	FOR THE APPLICANT
Andrea Jackett	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrett Tax Law Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT