Federal Court of Appeal  Cour d'appel fédérale

Date: 20140528

Docket: A-341-13

Citation: 2014 FCA 140

CORAM: **SHARLOW J.A.**
GAUTHIER J.A.
MAINVILLE J.A.

BETWEEN:

THE MINISTER OF NATIONAL REVENUE

Appellant

and

SIFTO CANADA CORP.

Respondent

Heard at Toronto, Ontario, on May 26, 2014.

Judgment delivered at Toronto, Ontario, on May 28, 2014.

REASONS FOR JUDGMENT BY: SHARLOW J.A.

CONCURRED IN BY: GAUTHIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

SHARLOW J.A.

[1] The Minister of National Revenue is appealing the order of Justice Rennie (2013 FC 986) dismissing the Minister's appeal of the order of Prothonotary Aalto (2013 FC 214), who dismissed the Minister's motion to strike two applications for judicial review. The decisions relate to a dispute under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The Minister takes

the position that it is plain and obvious that the entire dispute falls within the exclusive appellate jurisdiction of the Tax Court of Canada.

[2] For the reasons explained below, I agree with Justice Rennie that there is sufficient doubt about the Minister's position that one of the judicial review applications should be allowed to continue. The other decision is no longer the subject of a judicial review application because it has been discontinued. Accordingly, I would dismiss the appeal with respect to both applications.

I. Background

[3] The facts summarized in the next paragraph are the facts alleged in the notices of application for judicial review. Solely for the purpose of this appeal, those factual allegations are assumed to be true.

[4] On April 11, 2007, Sifto submitted an application to the Minister under the voluntary disclosure program in relation to the transfer price of rock salt it sold to a related United States corporation in its 2004, 2005 and 2006 taxation years. On March 18, 2008, the Minister accepted the disclosure as meeting the requirements of that program. Sifto understood that to mean that the Minister would waive any penalties relating to the transfer price of rock salt during the relevant taxation years. Subsequently, the Minister entered into agreements with Sifto to settle its income tax liability for its 2004, 2005 and 2006 taxation years. The agreements were based on a mutual agreement reached by the Canadian and United States taxing authorities under Articles IX and XXVI of the *Canada-United States Tax Convention (1980)* that determined the transfer

price of the rock salt. Later, the Minister informed Sifto that she did not consider herself bound by the agreements and that reassessments would be issued on the basis of a transfer price other than the amount stipulated in the settlement agreements. The Minister also informed Sifto that the reassessments would include penalties under subsection 247(3) of the *Income Tax Act*. The notices of reassessment were issued on August 1, 2012.

[5] It is common ground that the voluntary disclosure program is a program by which taxpayers are induced to disclose past tax compliance errors in the expectation that if the disclosure is accepted as meeting certain conditions, any penalties that might have been imposed in relation to the errors will be waived. The statutory basis for the voluntary disclosure program as it relates to the *Income Tax Act* is subsection 220(3.1) which reads in relevant part as follows:

220. (3.1) The Minister may … waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer … and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.	220 (3.1) Le ministre peut […] renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable […]. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

[6] It is the position of Sifto that once the Minister accepted its voluntary disclosure as meeting the conditions of the voluntary disclosure program, the Minister was bound to waive any penalties that might have been applied in respect of the transfer price errors that were the subject of the disclosure. That is consistent with the published terms and condition of the voluntary disclosure program, which in substance treats the submission of a voluntary disclosure as a request for the waiver of a penalty.

[7] The version of the published policy in force at the time relevant to this matter is Information Circular IC 00-1R2. I note in particular the following excerpts from that document.

> 8. The [voluntary disclosure program] promotes compliance with Canada's tax laws by encouraging taxpayers to voluntarily come forward and correct previous omissions in their dealings with the [Canada Revenue Agency]. Taxpayers who make a valid disclosure will have to pay the taxes or charges plus interest, without penalty or prosecution that the taxpayer would otherwise be subject to under the acts noted above.
>
> …
>
> 10. The [Canada Revenue Agency] has the legislative authority to provide relief for valid disclosures in accordance with the following legislative provisions:
>
> - subsection 220(3.1) of the [*Income Tax Act*] ….
>
> 11. If the [Canada Revenue Agency] accepts a disclosure as having met the conditions set out in this policy, it will be considered a valid disclosure and the taxpayer will not be charged penalties or prosecuted with respect to the disclosure.
>
> …
>
> 17. The Minister does not have to grant relief under the [voluntary disclosure program] provisions. Each request will be reviewed and decided on it's [*sic*] own merit. If relief is denied or partly granted, the [Canada Revenue Agency] will provide the taxpayer with an explanation of the reasons and factors for the decision.

[8] Paragraphs 31 to 42 set out the four conditions for a valid disclosure. In summary, the disclosure must be voluntary, it must be complete, it must involve the application or potential application of a penalty, and it must include information that is at least one year past due.

[9] The penalty in issue is provided for in subsection 247(3) of the *Income Tax Act*, relating to reassessments for transfer pricing adjustments. It is the provision under which the Minister assessed penalties against Sifto despite having accepted the voluntary disclosure. It is a lengthy

and technical provision and need not be reproduced here. It is enough to say that that the amount of the penalty is determined mainly on the basis of a mathematical formula. However, within the elements of the computation there is what appears to be a due diligence defence (or a partial due diligence defence) that *prima facie* would require in the first instance a factual determination by the Minister.

[10] Sifto also contends that the transfer price fixed by the settlement agreement referred to above embodies an agreement between the Canadian and United States tax authorities which is binding on the Minister by virtue of subsection 115.1(1) of the *Income Tax Act*. That provision reads as follows:

115.1 (1) Notwithstanding any other provision of this Act, where the Minister and another person have, under a provision contained in a tax convention or agreement with another country that has the force of law in Canada, entered into an agreement with respect to the taxation of the other person, all determinations made in accordance with the terms and conditions of the agreement shall be deemed to be in accordance with this Act.	115.1 (1) Malgré les autres dispositions de la présente loi, les montants déterminés et les décisions prises en conformité avec une convention qui est conclue entre le ministre et une autre personne, en conformité avec une disposition de quelque convention ou accord fiscal entre le Canada et un autre pays qui a force de loi au Canada, et qui vise l'imposition de l'autre personne, sont réputés conformes à la présente loi.

[11] The record contains no explanation for the Minister's decision to reassess as she did, and no explanation for the imposition of the penalties in the face of the accepted voluntary disclosure. That is because the proceedings in the Federal Court have not progressed to the point where an explanation is required.

II. Procedural history

[12] As mentioned above, the notices of reassessment referred to in Sifto's applications for judicial review were issued on August 1, 2012. The applications were filed on August 31, 2012.

[13] The first application (Federal Court File No. T-1618-12 entitled "Improper Penalties") seeks among other things an order declaring that the penalty assessments are "invalid and unenforceable". The second application (Federal Court File No. T-1619-12 entitled "Breach of Agreements") seeks a declaration that the Minister is bound by the settlement agreements and the agreement between the Canadian and United States tax authorities and cannot assess Sifto in breach of those agreements.

[14] On September 12, 2012, the Minister filed two notices of motion, each seeking an order striking out one of the applications for judicial review. Both motions were dismissed by Prothonotary Aalto in a single order on March 1, 2013. The Minister appealed that order under Rule 51. That appeal was heard by Justice Rennie and dismissed on September 26, 2013. I note that Justice Rennie's decision was rendered without the benefit of the decision of this Court in *Canada (Minister of National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250. The Minister now appeals to this Court, relying primarily on *JP Morgan*.

[15] On March 7, 2014, Sifto appealed the reassessments to the Tax Court and moved for a stay of this appeal pending the disposition of the Tax Court appeals. That motion was dismissed by Justice Noël on April 17, 2014 (2014 FCA 100).

[16] This appeal was set down for hearing on Monday, May 26, 2014. On May 23, 2014, Sifto filed in the Federal Court a notice of discontinuance of the Breach of Agreements application (T-1619-12), rendering this appeal moot in so far as it relates to that application. The Minister agreed at the hearing that this Court should dismiss that part of the appeal for mootness. I agree as well. The parties have requested an opportunity to make submissions as to costs after the disposition of all of the issues under appeal. The remainder of these reasons relate only to the part of the order under appeal that relates to the Improper Penalties application.

III. The test for striking an application for judicial review, and the standard of review

[17] A preliminary motion to strike an application for judicial review will fail unless the application is so clearly improper as to be bereft of any possibility of success: *JP Morgan* (cited above) at paragraph 47; *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.).

[18] The standard of appellate review in such cases is well settled. The most complete recent description is found in *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374 (per Justice Sexton) at paragraph 15:

> The respondents correctly point out that the decision to grant or refuse a motion to strike is a discretionary one. When the lower court judge has made a discretionary decision, it will usually be afforded deference by the appellate court. However, the latter will be entitled to substitute the lower court judge's discretion for its own if the appellate court clearly determines that the lower court judge has given insufficient weight to relevant factors or proceeded on a wrong principle of law: *Elders Grain Co. v. Ralph Misener (The)*, [2005] F.C.J. No. 612, 2005 FCA 139 at paragraph 13. This Court may also overturn a discretionary decision of a lower court where it is satisfied that the judge has seriously misapprehended the facts, or where an obvious injustice would otherwise result: *Mayne Pharma (Canada) Inc.*

> *v. Aventis Pharma Inc.*, [2005] F.C.J. No. 215, 2005 FCA 50, 38 C.P.R. (4th) 1 at paragraph 9.

This case has been followed in numerous cases in this Court, including *Canada v. Domtar Inc.*, 2009 FCA 218 (cited by the Minister) and *Canadian Imperial Bank of Commerce v. Canada*, 2013 FCA 122 (cited by Sifto).

IV. Discussion

[19] Fundamentally, the complaint of Sifto is that the Minister has not honoured the promise implicit in the voluntary disclosure program. In the information circular that describes that program, the Minister represents to all taxpayers that if a voluntary disclosure is accepted by the Minister as meeting the conditions in the relevant information circular, the Minister will exercise his or her statutory discretion to waive the penalties to which the voluntary disclosure relates. However, the Minister has assessed penalties against Sifto, contrary to Sifto's understanding of its entitlement to a waiver of those penalties.

[20] The question before this Court is whether the record discloses any basis for reversing the decision of Justice Rennie, who decided that the Improper Penalties application is not so clearly improper as to be bereft of any possibility of success. In my view, the record discloses no basis for appellate intervention.

[21] The disposition of a motion to strike an application for judicial review of a decision of the Minister in an income tax matter usually turns on whether the relief sought is within the

exclusive appellant jurisdiction of the Tax Court. That is because subsection 18.5 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, deprives the Federal Court of its administrative law jurisdiction for any matter that can be resolved by an appeal to the Tax Court.

[22] Some aspects of the assessment of an income tax penalty are the proper subject of an appeal to the Tax Court. The notice of appeal filed in the Tax Court is not before us but if, for example, the appeal requires the Tax Court to determine whether all of the statutory conditions for the imposition of the penalty are met, the Tax Court must do so and is the only Court that has the jurisdiction to do so. The same would be true if the Tax Court determines that the reassessments are not valid in so far as they fail to respect the settlement agreement or the agreement reached by the Canadian and United States taxing authorities under Articles IX and XXVI of the *Canada-United States Tax Convention (1980)* that determined the transfer price of the rock salt.

[23] However, it is equally clear that the Tax Court does not have the jurisdiction to determine whether the Minister properly exercised his or her discretion under subsection 220(3.1) of the *Income Tax Act* when deciding whether or not to waive or cancel a penalty. A challenge to such a decision can be made only by way of an application for judicial review in the Federal Court. That is the nature of the Improper Penalties application.

[24] The Minister argues also that the application is premature. I do not accept that argument as a basis for striking the application. The sparse record before this Court indicates that a request to cancel the penalties probably would be futile. But if the Minister is inclined to cancel the

penalties, it is open to him or her to do so at any time on the basis that the cancellation request is implicit in the application for judicial review, and that the penalties should not have been assessed in the face of an accepted voluntary disclosure.

[25] The Minister also takes issue with the remedies sought by Sifto in the Improper Penalties application, arguing that the Federal Court cannot grant the relief sought. I do not accept that argument because it is based on a technical and microscopic reading of the notice of application. The proper approach is to read the application holistically with a view to understanding its essential character, rather than fastening on matters of form (*JP Morgan* at paragraph 50). Thus, for example, while it is true that the Federal Court cannot invalidate an assessment (which is one of the remedies sought), the Federal Court may grant a declaration based on administrative law principles that the Minister acted unreasonably in failing to waive the penalties, or a declaration that the penalties should not have been assessed in the face of the valid voluntary disclosure. Similarly, the Federal Court may on the same basis grant another of the remedies sought, which an order precluding the Minister from enforcing the penalty assessment or collecting the resulting tax debt. And if the application is not perfectly drafted at this stage, the Federal Court has ample scope for permitting amendments if required to ensure that the actual dispute is properly before the Court.

[26] If the Improper Penalties application is permitted to continue, there will be parallel proceedings in the Tax Court and the Federal Court relating to different aspects of the penalty assessments. It may make sense for consideration of the Improper Penalties application to be deferred until the appeal in the Tax Court is complete, because if the Tax Court finds the

penalties to be invalid, the application may be moot. However, there may be good reason not to defer the hearing of the application. That is a case management matter for the Federal Court.

V. Conclusion

[27] For these reasons, I would dismiss the appeal.

[28] The parties have asked that the matter of costs be deferred until after the disposition of the appeal because they wish to make written submissions on costs. Costs will be the subject of a separate judgment to be issued after the submissions are received and considered. A direction relating to the length and timing of submissions will be issued concurrently with these reasons.

"K. Sharlow"

J.A.

“I agree
Johanne Gauthier J.A.”

“I agree
Robert M. Mainville J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-341-13

APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE RENNIE OF THE FEDERAL COURT OF CANADA, DATED SEPTEMBER 26,2013, DOCKET NUMBERS T-1618-12 & T-1619-12

STYLE OF CAUSE:	THE MINISTER OF NATIONAL REVENUE v. SIFTO CANADA CORP.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 26, 2014
REASONS FOR JUDGMENT BY:	SHARLOW J.A.
CONCURRED IN BY:	GAUTHIER J.A. MAINVILLE J.A.
DATED:	MAY 28, 2014

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