Federal Court  Cour fédérale

Date: 20160823

Docket: T-956-13

Citation: 2016 FC 955

Ottawa, Ontario, August 23, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

DAVID ANTHONY

Applicant

and

CANADA REVENUE AGENCY

Respondent

JUDGMENT AND REASONS

[1] The Applicant has brought an application pursuant to section 18.1 of the *Federal Courts Act*, RCS 1985, c F-7, as am, for judicial review of a decision by a delegate of the Minister of National Revenue dated May 2, 2013. The decision under review denied the Applicant a personal deduction for rental expenses incurred in leasing two machines which he used to earn income in 2001 on the basis that the machines were leased in the name of his corporation, D.A. Machining Consulting Inc., and such expenses were deductible against income earned by the corporation.

I. Background

[2] The Applicant, David Anthony, is a self-employed machinist. In 2000, the Applicant's partner, AKM Machinery Sales Inc. [AKM], purchased a milling machine and a lathe machine. In 2001, the Applicant's suspicion that his partner was cheating him of income led him to start billing his customers directly under his business name, D.A. Machining Consulting, while paying his partner for use of the machines. After the Applicant moved to another location in August 2001, he arranged to acquire the machines from AKM through CIT Financial Ltd. [CIT] who bought the machines and then leased them back to the Applicant's corporation, D.A. Machining Consulting Inc. The Applicant says he intended to transfer and rollover the business of D.A. Machining Consulting into his corporation in 2002; however, his accountant at the time did not complete the intended rollover.

[3] In April 2005, the Applicant's 2001 and 2002 tax returns were audited by the Canada Revenue Agency; the CRA found unreported revenue and disallowed some expense claims, including the capital cost allowance the Applicant had claimed for the two machines. Following a meeting the Applicant and his accountant had with a CRA auditor relating to the reassessments, the CRA offered in a letter dated February 1, 2007, to settle the issues arising from the Applicant's 2001 and 2002 taxation years if the Applicant signed a waiver of his appeal rights for both 2001 and 2002 in respect of his business income and expenses. The Applicant says he understood from his accountant that, despite having signed the waiver, he would still be able to appeal the issues concerning the two machines to the Tax Court of Canada. However, the Tax Court denied his appeal in a judgment dated October 17, 2007, finding that the Applicant was

bound by the waiver he had signed and that subsection 169(2.2) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the *ITA*] barred any right to appeal the reassessment of his 2001 taxation year in relation to business expenses (see: *Anthony v The Queen*, 2007 TCC 606, [2008] 2 CTC 2398).

[4] In November 2010, the Applicant filed a T1 Adjustment Request for his 2001 taxation year, requesting that the Minister reassess his tax liability for that year to allow a deduction for rental expenses associated with the two machines. This request was denied though, in a letter dated September 21, 2011, on the basis that the purpose of subsection 152(4.2) was not to dispute or disagree with the correctness of an assessment that had been previously dealt with under an objection. Accordingly, on January 19, 2012, the Applicant's accountant wrote to the CRA, requesting a second administrative review in respect of the rental payments for the two machines in the 2001 taxation year. This second request was also denied, however, in a letter dated May 2, 2013, in which the Minister's delegate stated:

> With respect to the machine rental payments paid to CIT Financial Ltd. on behalf of your corporation, we are unable to grant your request to deduct $22,370. The lease agreement is between CIT Financial Ltd. as the lessor and D. A. Machining Consulting Inc. as the lessee. According to the facts of the case, these machines were used by D. A. Machining Consulting Inc. to earn income. The rental expenses incurred are deductible against the income earned by D. A. Machining Consulting Inc. In this case, expenses were paid by you as a shareholder of D. A. Machining Consulting Inc. Therefore, the rental expenses are not deductible on your personal T1 income tax return and your request for an additional deduction from your personal income for the 2001 taxation year is denied.

[5] The Applicant now asks that the Court quash the decision made by the Minister's delegate and send the matter back to be dealt with by a different delegate.

II. Issues

[6] This application raises the following issues:

1. Is the matter properly before the Federal Court?
2. If so, should the documentation submitted by the Applicant which was not before the Minister's delegate be accepted or considered by the Court?
3. What is the appropriate standard of review?
4. Was the decision under review unfairly rendered or substantively unreasonable such that it should be quashed?

III. Analysis

A. *Is this matter properly before the Federal Court?*

[7] Although neither party has questioned whether this Court has jurisdiction to hear and determine this matter, it is nevertheless appropriate to consider this issue because the Court should not assume jurisdiction over a matter which is beyond its jurisdiction. In addressing this issue, I begin by noting that subsection 12(1) of the *Tax Court of Canada Act*, R.S.C. 1985 c. T-2 [*TCCA*], empowers the Tax Court of Canada with "exclusive original jurisdiction to hear and determine references and appeals … on matters arising under [various Acts, including] … the *Income Tax Act* … when references or appeals to the Court are provided for in those Acts." That court also has exclusive original jurisdiction to hear and determine questions referred to it under sections 173 or 174 of the *ITA* (*TCCA* ss. 12(3)).

[8] Furthermore, section 18.5 of the *Federal Courts Act* divests the Federal Court of its administrative law jurisdiction for any matter that can be resolved by an appeal to the Tax Court (see: *Canada (National Revenue) v Sifto Canada Corp.*, 2014 FCA 140 at para 21, [2014] 5 CTC 26 [*Sifto*]). Consequently, although the Federal Court has broad powers with respect to judicial review, it cannot deal with matters which are appealable to the Tax Court (see: *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para 27, [2014] 2 FCR 557 [*JP Morgan*]).

[9] When faced with an application for judicial review concerning matters arising in relation to the *ITA*, this Court must read and assess the application "holistically with a view to understanding its essential character, rather than fastening on matters of form" (*Sifto* at para 25). It must also be alert to "skilful pleaders" who can "make Tax Court matters sound like administrative law matters when they are nothing of the sort" *(JP Morgan* at para 49). Also, it is clear that the Federal Court's jurisdiction includes judicial review of the exercise of ministerial discretion by the Minister provided the matter is not otherwise appealable (see: *Canada v Addison & Leyen Ltd.*, 2007 SCC 33 at para 8, [2007] 2 SCR 793).

[10] To properly be in Federal Court when the *ITA* is engaged, an applicant must: (1) show that judicial review is available under sections 18 and 18.1 of the *Federal Courts Act*; and (2) "state a ground of review that is known to administrative law or that could be recognized in administrative law" (*JP Morgan* at paras 68-70). In *JP Morgan*, the Federal Court of Appeal identified (at para 70) three grounds of judicial review known to administrative law, namely:

(a) lack of *vires*; (b) procedural unacceptability; and (c) substantive unacceptability (i.e., a decision that is not reasonable).

[11] Sections 18 and 18.1 of the *Federal Courts Act* focus on the Federal Court's jurisdiction and the timelines and available remedies with respect to an application for judicial review. In this case, the Applicant has met the appropriate timelines for his judicial review application and is requesting a remedy within this Court's jurisdiction; namely, that the decision dated May 2, 2013 be quashed and the matter sent back for redetermination by a different delegate of the Minister. Consequently, the Applicant's application for judicial review satisfies the first requirement emanating from *JP Morgan* (at paras 68-69; also see: *Air Canada v Toronto Port Authority et al*, 2011 FCA 347 at paras 24-29, [2013] 3 FCR 605).

[12] The second prong of the *JP Morgan* test asks whether the application states a ground of review known to administrative law or one which could be recognized in administrative law. In this case, the Applicant raises issues of procedural or substantive unacceptability, asserting that the Minister's delegate ignored relevant evidence or misapprehended the facts and arbitrarily failed to exercise his discretion under the taxpayer relief provisions. These issues, in turn, prompt the question of whether they raise cognizable administrative law claims over which this Court has jurisdiction.

[13] In my view, the issues raised by the Applicant in this application involve cognizable administrative law claims and, accordingly, I conclude that the Court has jurisdiction to hear and decide the Applicant's application for judicial review. This conclusion is reinforced by numerous

cases where this Court has assumed and exercised jurisdiction to judicially review an exercise of the Minister's discretion under subsection 152(4.2) of the *ITA* (see: e.g., *Ford v Canada (Attorney General)*, 2015 FC 1057, appeal dismissed 2016 FCA 128 (CanLII); *Sullivan v Canada*, 2014 FC 486 (CanLII), 455 FTR 159; *Lambert v Canada (Attorney General)*, 2015 FC 1236 (CanLII); *Canada (Attorney General) v Abraham*, 2012 FCA 266, 440 NR 201 [*Abraham*]; *White v Canada (Attorney General)*, 2011 FC 556, 390 FTR 36; *Caine v Canada Revenue Agency*, 2011 FC 11 (CanLII), 382 FTR 111; *Hoffman v Canada (Attorney General)*, 2010 FCA 310 (CanLII) [*Hoffman*]; *Leblanc v Canada (Attorney General)*, 2010 FC 688, 371 FTR 191 [*LeBlanc*]; *Lemerise v Canada (Attorney General)*, 2010 FC 116 (CanLII); *Nicholls v Canada (National Revenue)*, 2010 FCA 30 (CanLII); *Taylor v Canada*, 2008 FC 1317 (CanLII), [2009] 2 CTC 173; *Beaulieu v Canada (Attorney General)*, 2008 FC 1236 (CanLII), [2009] 3 CTC 149; *Costabile v CCRA*, 2008 FC 943 (CanLII), [2009] 1 CTC 193; *Lanno v Canada (Customs & Revenue Agency)*, 2005 FCA 153 (CanLII), [2005] 2 CTC 327 [*Lanno*]; *Hindle v Canada (Customs and Revenue Agency)*, 2004 FC 625 (CanLII), [2004] 3 CTC 178; and *Plattig v Canada (Attorney General)*, 2003 FC 1074 (CanLII), [2004] 1 CTC 93).

B. *Should the documentation submitted by the Applicant which was not before the Minister's delegate be accepted or considered by the Court?*

[14] The Respondent submits that certain documentation in the record was not before the Minister's delegate when he made the decision under review and that such documentation should neither be accepted as evidence nor considered by the Court in its review of the decision. In particular, the Respondent points to the following documents which should not form part of the record for purposes of judicial review: namely, a letter to the Minister's delegate dated May 15,

2013; a statement of facts and circumstances dated July 1, 2013 prepared by the Applicant's tax preparer; a memorandum of understanding between the Applicant and his corporation dated September 27, 2014; a summary list of machine lease payments; a working paper dated December 20, 2006; and a letter dated February 1, 2007.

[15] I agree with the Respondent that only the documents and information that were before the Minister's delegate can be considered by a reviewing court on judicial review. As a general rule, the record for judicial review is usually limited to that which was before the decision-maker; otherwise, an application for judicial review would risk being transformed into a trial on the merits, when a judicial review is actually about assessing whether the administrative action was lawful (see: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 14-20, 428 NR 297 [*Association of Universities*], cited in *Gaudet v Canada (Attorney General)*, 2013 FCA 254 at para 4, [2013] FCJ No 1189 (QL); also see: *Bernard v. Canada (National Revenue)*, 2015 FCA 263 at paras 13-28, [2015] FCJ No 1396 (QL)).

[16] There are a few recognized exceptions to the general rule against the Court receiving evidence which was not before the decision-maker in an application for judicial review, "and the list of exceptions may not be closed" (see: *Association of Universities* at para 20). Does the documentation which was not before the Minister's delegate in this case fall within one of these exceptions as noted in *Association of Universities*?

[17] The first exception involves situations where affidavits are sometimes necessary to bring the Court's attention to procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural fairness. I do not see the additional documentation in this case as being such that it falls within this exception because it does not offer evidence as to whether the decision under review was rendered in a procedurally unfair manner. The second exception arises when an affidavit is received on judicial review in order to highlight a complete absence of evidence before the decision-maker in making a particular finding. Again, I do not see the additional documentation in this case as being such that it falls within this exception because the record before the Minister's delegate contained documentation upon which he could ground his finding as to who was responsible for the lease payments and entitled to a deduction for them. The third exception can apply when the Court accepts an affidavit that provides general background in circumstances where such information might assist it in understanding the issues relevant to the judicial review; in this regard, the Federal Court of Appeal has cautioned that: "Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider" (*Association of Universities* at para 20). Again, I do not see the additional documentation in this case as being such that it falls within this exception.

[18] Accordingly, none of the additional documentation is admissible as evidence and it must be ignored. It cannot be and has not been considered by the Court in reviewing the decision of the Minister's delegate.

C. *What is the appropriate standard of review?*

[19] The parties submit that the applicable standard of review in respect of the decision by the Minister's delegate is one of reasonableness. I agree (see: *Lanno* at paras 4 to 7; also see *Hoffman* at para 5, and *Abraham* at para 33).

[20] Accordingly, although the Court can intervene "if the decision-maker has overlooked material evidence or taken evidence into account that is inaccurate or not material" (*James v Canada (Attorney General)*, 2015 FC 965 at para 86, 257 ACWS (3d) 113), it should not do so if the decision under review is justifiable, transparent, and intelligible, and it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 S.C.R. 708.

[21] Furthermore, the decision under review must be considered as an organic whole and the Court should not embark upon a line-by-line treasure hunt for error (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34 at para 54, [2013] 2 SCR 458). Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a

reviewing court to substitute its own view of a preferable outcome": see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339.

[22] In the present case, the decision made under subsection 152(4.2) of the *ITA* is a discretionary one. Subsection 152(4.2) of the *ITA* does not provide the Applicant with an entitlement to relief; on the contrary, it only gives the Applicant "a right to ask the Minister to exercise his discretion to reassess after the expiration of the normal reassessment period" (*Abraham* at para 26). The scope of judicial review in respect of a decision made under subsection 152(4.2) is, therefore, "quite narrow" (see: *LeBlanc* at para 25); and as noted by the Federal Court of Appeal in *Barron v. Canada (Minister of National Revenue - M.N.R.)*, [1997] FCJ No. 175 (QL) at para 5, [1997] 2 CTC 198, when an application for judicial review concerns a decision made in the exercise of the Minister's discretion under subsection 152(4.2), the court may intervene and set aside the decision under review "only if that decision was made in bad faith, if its author clearly ignored some relevant facts or took into consideration irrelevant facts or if the decision is contrary to law."

D. *Was the decision under review unfairly rendered or substantively unreasonable such that it should be quashed?*

[23] The Applicant contends that the Minister's delegate misapprehended or ignored relevant evidence, in particular that his Corporation was inactive, and, consequently, the Minister improperly and arbitrarily failed to exercise his discretion under the taxpayer relief provisions. According to the Applicant, it was unfair for the Minister's delegate not to "match" the expenses he incurred in paying the rental payments for the two machines against the income he earned by

using the machines, and this creates unfairness in view of cases such as *Canderel Ltd v The Queen*, [1998] 1 SCR 147, 222 N.R. 81[*Canderel*] and *Imperial Financial Services Ltd. v Minister of National Revenue*, [1991] 1 CTC 2031, 91 DTC 184 [*Imperial Financial*]. The Applicant says that, although his corporation's name was on the lease with CIT, the corporation was in fact inactive and he, as an individual, earned the income from the machines and the lease payments he made should be deductible expenses for him.

[24] The Applicant's reliance upon *Canderel* and *Imperial Financial* is misguided. Both *Canderel* and *Imperial Financial* dealt with disputes concerning the computation of profit for income tax purposes and not, as is the case here, the appropriate person entitled to a deduction for the rental payments on the two machines. Moreover, the matching principle is not a rule of law which dictates or requires that expenses must always be matched with profits; it is simply an accounting principle that a court may or may not consider depending upon the particular facts and circumstances of a case. In this regard, Justice Iacobucci, writing for the Supreme Court in *Canderel*, stated as follows:

> 43 …I should now like to discuss what exactly is the question that must be answered when attempting to assess a taxpayer's profit for tax purposes. A good place to begin is with the decision of the Federal Court of Appeal in *West Kootenay*, *supra*, where MacGuigan J.A. stated at p. 6028:
>
> > The approved principle is that whichever method presents the "truer picture" of a taxpayer's revenue, which more fairly and accurately portrays income, and which "matches" revenue and expenditure, if one method does, is the one which must be followed.
>
> 44 In the court below, Stone J.A. took this passage as grounding his conclusion that the matching principle of accounting has been elevated to a rule of law. Obviously, in light of my previous comments, I do not, with respect, subscribe to that point

> of view. To my mind, the significance of this statement is to confirm a much sounder proposition: that the goal of the legal test of "profit" should be to determine which method of accounting best depicts the reality of the financial situation of the particular taxpayer. If this is accomplished by applying the matching principle, then so be it. On the other hand, if some other method is appropriate, is permissible under well-accepted business principles, and is not prohibited either by the Act or by some specific rule of law, then there is no principled basis by which the Minister should be entitled to insist that the matching principle -- or any other method, for that matter -- be employed.

[25] The Applicant argues, in essence, that because the profit generated by the two machines ultimately went into his pocket and he paid taxes on such profit, the deduction for rental payments for the machines should also “match” and be attributed and available to him. This argument, however, is fatally flawed because it ignores the basic fact of the matter; that is, that the lease agreement with CIT for the machines was in the name of the Applicant’s corporation and not in the name of the Applicant. The Applicant chose to collect revenue generated by the machines personally, rather than through his corporation, and he cannot rely upon an accounting principle to ignore the legal reality of the lease and argue that the cost of the lease payments should be attributed to him personally and deductible from his personal income for the 2001 taxation year. In my view, it was reasonable for the Minister’s delegate to deny the Applicant a personal deduction for the rental payments because the Applicant’s corporation, not the Applicant, was responsible for such payments under the lease agreement and, as the delegate noted, the rental expenses were deductible against income earned by the corporation.

[26] I reject the Applicant’s submission that the Minister’s delegate ignored relevant evidence or misapprehended the facts such that his decision was rendered in a procedurally unfair manner or otherwise unreasonable. The Applicant does not point to any evidence in the record that shows

the Minister's delegate misapprehended or ignored any material facts. It is true that the decision does not explicitly address the Applicant's assertion that his corporation was inactive and that the Minister's delegate ignored or misapprehended this fact, one which the Applicant characterizes as being significant. However, it is not completely accurate to assert, as the Applicant does, that his corporation was inactive because, even if it may not have been earning any income, it was nonetheless active at least to the extent it incurred monthly obligations for the rental payments. Moreover, even if the Applicant's corporation was simply a shell, it was a shell that nevertheless was the party to the lease agreement with CIT and protected the Applicant from personal liability for the rental payments. In my view, it was not unreasonable for the Minister's delegate to determine that the Applicant's corporation, rather than the Applicant, should benefit from any deduction for the rental payments since it had the liability for the rental payments. As noted by the Federal Court of Appeal in *R v Friedberg*, [1991] FCJ No 1255 (FCA), aff'd [1993] 4 SCR 285, a case where the taxpayer was denied a deduction for a gift he funded for a museum to acquire a collection of textiles because he had not acquired title to the collection:

> 5 In tax law, form matters. A mere subjective intention, here as elsewhere in the tax field, is not by itself sufficient to alter the characterization of a transaction for tax purposes. …If a taxpayer fails to take the correct formal steps…tax may have to be paid. If this were not so, Revenue Canada and the courts would be engaged in endless exercises to determine the true intentions behind certain transactions. …evidence of subjective intention cannot be used to "correct" documents which clearly point in a particular direction.

[27] In short, I find that the decision made by the Minister's delegate was a reasonable one and not rendered in an unfair manner.

IV. Conclusion

[28] The Court's intervention is not required in this case. The decision of the Minister's delegate is justifiable, transparent, and intelligible, and it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[29] The Respondent has requested costs. Since the application has been dismissed, the Respondent is entitled to costs in such amount as may be agreed to by the parties. If the parties are unable to agree as to the amount of such costs within 15 days of the date of this judgment, the Respondent shall thereafter be at liberty to apply for an assessment of costs in accordance with the *Federal Courts Rules*, SOR/98-106.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and that the Respondent is entitled to costs in such amount as may be agreed to by the parties, provided that if the parties are unable to agree as to the amount of such costs within 15 days of the date of this judgment, the Respondent shall thereafter be at liberty to apply for an assessment of costs by an assessment officer in accordance with the *Federal Courts Rules*, SOR/98-106.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Osborne G. Barnwell	FOR THE APPLICANT
Laurent Bartleman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Osborne G. Barnwell Barrister and Solicitor North York, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT