Federal Court Cour fédérale

Date: 20161122

Docket: T-1400-16

Citation: 2016 FC 1292

Ottawa, Ontario, November 22, 2016

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

JONATHAN N. GARBUTT

Applicant

and

HER MAJESTY THE QUEEN

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] These proceedings commenced with Mr. Jonathan N. Garbutt filing a notice of application for judicial review, challenging the Canada Revenue Agency's [CRA] decision to issue two notices of assessment totalling some $22,000.00 for his 2015 and 2016 fiscal years. The applicant then filed a notice of motion asking this Court to confirm its jurisdiction over the matter. Finally, the applicant requested that this Court compel the respondent to file the CRA's

Certified Tribunal Record [CTR] and set an expeditious litigation schedule. The respondent opposed this motion and filed a motion to strike the application for judicial review on the ground that this Court lacks jurisdiction in the matter, and that the issue falls under the exclusive jurisdiction of the Tax Court of Canada.

[2] For the reasons discussed below, the respondent's motion to strike will be granted. As a result, the applicant's motion asking this Court to confirm its jurisdiction in the matter is moot, and his application for judicial review is struck.

II. Facts

[3] The applicant is a tax lawyer doing business in the province of Alberta.

[4] During the course of an audit of the applicant's affairs, composed of a sole proprietorship payroll account, the CRA was interested in the applicant's employee income tax withholdings, their Canada Pension Plan (CPP) and Employment Insurance (EI) withholdings, and the employer contributions in respect of the 2015 taxation year and four first months of the 2016 taxation year.

[5] On May 12, 2016, a CRA trust accounts officer sent a letter to the applicant, whereby he advised him that on May 25, 2016, he would enter into his premises to conduct an examination of his payroll books and records. The officer further requested that the applicant provide the following books and records:

(i) General ledger and subsidiary ledgers;

(ii) Payroll journals including salaries, wages, and commissions for the period;

(iii) Cash receipts and disbursements journal;

(iv) Bank statements and cancelled cheques;

(v) Current list of accounts receivable (including credit card merchant numbers) and accounts payable;

(vi) Year 2015 T4 slips and year 2015 T4 Summary;

[the “Required Documents”].

[6] By letter to the officer dated July 11, 2016, the applicant answered that he was out of town on May 25, 2016 and that the address mentioned in the May 12 letter was his residential address, and not that of his business.

[7] He moreover invoked his clients’ solicitor-client privilege with regard to items (i), (iii), (iv), and (v) of the Required Documents. He provided the year 2015 T4 slips and his year 2015 T4 summary and stated he was willing to provide additional relevant documents regarding his sole employee.

[8] On July 25, 2016, the officer decided to issue the two notices of assessment in respect of the applicant’s withholdings and employer contributions, in the amounts of $9,220.26 for 2015 and $12,790.94 for 2016.

[9] The applicant filed an application for judicial review in respect of the officer’s decision to issue the assessments. The applicant asks this Court to quash that decision or, in the alternative, that the file be sent back to the CRA for redetermination by a different officer.

[10] The respondent first refused to file the CRA's CTR, on the basis that this Court lacks jurisdiction to hear the matter, as jurisdiction over assessments is exclusive to the Tax Court of Canada under the *Tax Court of Canada Act*, RSC 1985 c T-2 subsection 12(1).

[11] The applicant then filed a motion for the purpose of obtaining:

> (i) An order from the Court compelling the respondent to produce the CTR;
>
> (ii) An order from the Court confirming its jurisdiction in the matter; and
>
> (iii) An order from the Court setting an expeditious litigation schedule and expedited date for a hearing of this matter.

[12] The respondent then filed a motion for the purpose of obtaining an order striking the applicant's application for judicial review on the ground that the Federal Court does not have jurisdiction over the subject matter of the application.

[13] Meanwhile, the applicant has challenged the assessments pursuant to the procedure outlined in the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA]. He filed notices of objection under section 165 of the ITA and is currently waiting to appeal to the Tax Court under section 169 of the ITA.

III. Issues

[14] These motions raise the following issues:

A. *Should the notice of application for judicial review be struck for lack of jurisdiction?*

[15] If the answer to this first question is no:

B. *Whether the Federal Court has jurisdiction to review the reasonableness of an assessment issued by the CRA, on behalf of the Minister of National Revenue?*

C. *Whether the respondent should be ordered to provide the CTR?*

D. *Whether the matter should proceed in an expeditious manner?*

IV. Analysis

A. *Should the notice of application for judicial review be struck for lack of jurisdiction?*

[16] The test for striking an application for judicial review is whether, assuming the facts pleaded to be true, it is plain and obvious that it cannot succeed or that it has no reasonable prospect of success (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17). The respondent argues that the application for judicial review cannot succeed because (i) the Tax Court is the exclusive forum to grant the relief sought by the applicant, as per section 18.5 of the *Federal Courts Act*, RSC, 1985, c F-7, and (ii) the Federal Court cannot prevent the Minister from administering and enforcing the ITA. As a result, the respondent submits that it is plain and obvious that the application has no chance of success.

[17] On the other side, the applicant submits that his application for judicial review is not a collateral attack on the Tax Court's jurisdiction. The Tax Court does not have the statutory power to review the reasonableness of an assessment, it only has jurisdiction to determine the correctness of the quantum of an assessment.

[18] He further argues that regarding the correctness of the quantum of an assessment, the burden lies on the taxpayer. Since a substantial portion of the Required Documents is privileged, the applicant submits that he would be able to bring very limited evidence before the Tax Court. Since, in appropriate circumstances, judicial review of the exercise of ministerial discretion, in the context of taxation, is available (*Canada v Addison & Leyen Ltd*, 2007 SCC 33 at paras 8, 11), the Federal Court of Appeal in *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 enumerated circumstances under which it is available and warranted. The applicant states that two of these circumstances exist here: (i) when the decision is *ultra vires*, and (ii) when it is substantively unacceptable.

[19] Regarding *vires*, the court in *JP Morgan* stated that administrative action cannot be authorized by unconstitutional legislation (*JP Morgan*, above at para 70). The applicant argues that by the respondent's own admission, the officer, in issuing the assessments, based her decision on the applicant's refusal to provide all the Required Documents. As those provisions of the ITA (Requirement to provide documents or information) were recently found to be unconstitutional and of no effect when they are used against notaries and legal advisors (*Canada (National Revenue) v Thompson*, 2016 SCC 21 and *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20), the decision by the officer to issue the assessments was *ultra vires* the CRA. As such, there is an issue of *vires* that only this Court can review.

[20] The applicant also argues that the decision is substantively unacceptable. In *JP Morgan*, the Federal Court of Appeal held that administrative action must either be correct or fall within a range of outcomes that are acceptable or defensible on the facts and the law (*JP Morgan*, above

at para 70). In *Canada (Attorney General) v Abraham*, 2012 FCA 266, it further held that "where the decision-maker is considering a discretionary matter that has greater legal content, the range of possible, acceptable outcomes open to the decision-maker might be narrower. Legal matters, as opposed to factual or policy matters, admit of fewer possible, acceptable outcomes" (*Abraham*, above at para 44). Given the quasi-constitutional status of solicitor-client privilege, says the applicant, the decision is not an acceptable outcome.

[21] I agree with the respondent that whether the Federal Court has jurisdiction to consider the issue and grant the relief sought depends upon the characterization of the essential nature of the claim. The nature of the claim then indicates whether the Federal Court or the Tax Court of Canada has jurisdiction.

[22] Having considered all of the applicant's argument, I am of the view that this application for judicial review should be struck.

[23] The applicant makes an artificial distinction between the Minister's decision to assess and the assessments themselves. The assessments are the result of the assessment process (*Bowater Mersey Paper Co v R*, [1987] FCJ No 427, 87 DTC 5382 at para 10) and there is no discrete decision within the above process which can be the subject of judicial review.

[24] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success" (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1994] FCJ No 1629, [1995] 1 FC 588 at para 15; *JP Morgan*, above at

para 47). It requires an obvious, fatal flaw striking at the root of this Court's power to entertain the application (*Rahman v Public Service Labour Relations Board*, 2013 FCA 117 at para 7; *JP Morgan*, above at para 47).

[25] The following were found in *JP Morgan*, to be obvious, fatal flaws warranting the striking out of a notice of application:

> (i) the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;
>
> (ii) the Federal Court is not able to deal with the administrative law claim by virtue of section 18.5 of the *Federal Courts Act* or some other legal principle; or
>
> (iii) the Federal Court cannot grant the relief sought.
>
> (*JP Morgan*, above at para 66)

[26] Any of these objections are in and of themselves grounds to strike the application if they are made out. I am of the view that all three objections are present in this case.

[27] First, the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court. In order to demonstrate a cognizable administrative law claim, the judicial review must be available under the *Federal Courts Act* and it must state a ground of review that is known to administrative law (*JP Morgan*, above at paras 67, 68, and 70).

[28] Contrary to the applicant's view, the basis for the assessments is subsection 152(7) of the ITA, the provision which empowers the Minister to assess tax whether or not a taxpayer has

supplied or returned information. This provision is not unconstitutional and therefore the basis for the decision is not *ultra vires*.

[29] I also do not agree with the applicant's view that the assessments are substantively unacceptable. The statutory language allows the Minister to issue an assessment whether or not a tax return or required information or documents have been filed (ITA, above at ss 152(7)). Due to the Minister's duty to issue an assessment in the face of liability for tax (*JP Morgan*, above at para 77), there was no discretion for the Minister to abuse. Therefore, the applicant failed to state a cognizable administrative law claim.

[30] I find that what the applicant is actually challenging is the legal validity of the assessments, which is not an administrative ground which can be brought to this Court.

[31] Second, the Federal Court is barred by section 18.5 of the *Federal Courts Act* from dealing with the applicant's claim. As outlined above, section 18.5 states that where an Act of Parliament expressly provides for an appeal to the Tax Court of Canada, the decision is not subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with. Parliament has declared the Tax Court's powers concerning assessments to be exclusive in subsection 12(1) of the *Tax Court of Canada Act*.

[32] What the applicant is asking this Court to do is to review a challenge to the assessments issued by the CRA under subsection 152(7) of the ITA, which gives the Minister the power to assess. However, in *JP Morgan*, the Federal Court of Appeal stated that an appeal to the Tax

Court is available, adequate, and effective in giving the taxpayer the relief sought, and so judicial review to the Federal Court is not available when what is requested is a review of the validity of an assessment or the admissibility of evidence supporting an assessment (*JP Morgan*, above at para 82).

[33] This is precisely what the applicant is arguing in his application for judicial review; he is arguing that by virtue of disregarding his claim for solicitor-client privilege over a portion of the Required Documents, and therefore disregarding the Supreme Court of Canada's ruling in *Thompson* and *Chambre des notaires*, and nevertheless going forward with the assessments, the decision by the CRA is not valid. This squarely falls within the Tax Court's jurisdiction, as the Tax Court provides a complete appeal procedure that allows taxpayers to raise in the Tax Court all issues relating to the correctness of an assessment, *i.e.,* whether the assessment in question is supported by the facts of the case and the applicable law (*JP Morgan*, above at para 82).

[34] Furthermore, on an appeal, the Tax Court can consider the admissibility of evidence before it (*JP Morgan*, above at para 82). To the extent that the conduct of the Minister is alleged to affect the admissibility of evidence, that must be litigated before the Tax Court (*JP Morgan*, above). Specifically, where a taxpayer has concerns regarding certain evidence being used against him or her for the purposes of reassessment, the proper venue to challenge its admissibility is the Tax Court of Canada (*Redeemer Foundation v Canada (National Revenue)*, 2008 SCC 46 at para 28). Therefore, the applicant's concern regarding his assertion of privilege over the Required Documents, including the constitutional challenge, is a matter that ought to be dealt with by the Tax Court. What's more, the applicant's concern that he will not be able to

discharge the burden imposed on the taxpayer to make his case before the Tax Court, is also best dealt with by the Tax Court itself, and not this Court on judicial review.

[35] Accordingly, I agree with the respondent that the Federal Court does not have jurisdiction to hear challenges to tax assessments (*Optical Recording Corp v Canada*, [1991] 1 FC 309 at para 22).

[36] Third, the Federal Court is precluded from granting the relief sought by the applicant. This is the third basis for striking out a notice of application for judicial review in the Federal Court, outlined by the Federal Court of Appeal in *JP Morgan*. The Federal Court is limited to the remedies in the *Federal Courts Act*, subsection 18.1(3) and any remedies associated with its plenary power (*JP Morgan*, above at para 92). Essentially, the remedy sought by an applicant must be one that is not barred or inconsistent with statute. If a notice of application before this Court seeks only remedies that cannot be granted, it must be struck (*JP Morgan*, above at para 92).

[37] The ITA clearly states, under subsection 152(8), that an assessment is deemed to be valid, subject only to a reassessment or variation by a successful objection or by a successful appeal of the assessment brought to the Tax Court. Therefore, the assessments stand until varied or vacated by the Tax Court (*Optical Recording Corp*, above at para 22; *JP Morgan*, above at para 93). In light of this, the Federal Court of Appeal in *JP Morgan* concluded that if the "essential character" of the relief sought is the setting aside of an assessment, it must be struck (*JP Morgan*, above at para 93).

[38] By virtue of my conclusion that the application for judicial review ought to be struck, it is unnecessary to address the remaining issues brought forward by the applicant.

V. Conclusion

[39] The applicant's notice of application for judicial review is bereft of any chance of success as all three fatal flaws outlined in *JP Morgan* are present. Accordingly, it must be struck out. Costs shall be granted to the respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The respondent's motion to strike the applicant's application for judicial review is granted;
2. The applicant's application for judicial review is dismissed;
3. Costs are granted to the respondent.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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