Federal Court  Cour fédérale

Date: 20180328

Docket: T-882-17

Citation: 2018 FC 343

Ottawa, Ontario, March 28, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ASHLEY ELIZABETH NEWTON

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] of a decision made by the Chief of Appeals (the "Delegate") of the Canada Revenue Agency ("CRA") refusing to exercise his discretion to not enforce an assessment issued pursuant to subsection 227.1(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [*ITA*].

II. Background

[2] On February 4, 2010, the Applicant incorporated Vixen Salon & Beauty Bar Ltd. (the "Corporation"). She served as its director, president and secretary. She also retained the services of a lawyer and an accounting firm (the "Representatives"), which she relied on for tax and other business matters relating to the Corporation.

[3] On December 14, 2012, the Applicant sent the following email to the Corporation and her Representatives, with the belief that it was sufficient to resign as director of the Corporation:

> To whom it may concern,
>
> I, Ashley Newton, am writing to grant authorization to Walter Shaun Newton to deal with all matters relating to [the Corporation] as well as the lease and all documentation of the premise at 123 Princess Street. I am also consenting to terminating the lease of the space at 123 Princess Street upon the condition that the sale of the property goes through.
>
> I am also requesting a copy of the signed and dated lease, which I will need as soon as possible.
>
> Ashley Newton

[4] As well, the Applicant allegedly instructed her Representatives to carry out the necessary filings and dissolve the Corporation. She claims that from that date forward, she did not have any involvement with the Corporation and believed it had been dissolved.

[5] The Applicant later learned that her Representatives never filed articles of dissolution, nor did they file an application for supplementary certificate of registration pursuant to *The*

Corporations Act, CCSM, c C225, to remove her as the listed director. She was not aware that these filings were necessary to sever her legal relationship with the Corporation.

[6] On June 20, 2014, the Corporation was dissolved by the Manitoba Companies Branch.

[7] On February 9, 2015, the CRA sent two notice of assessments (the "Assessments") to the Applicant regarding her liability as director for taxes incurred by the Corporation in the amount of $71,244.07 pursuant to subsection 227.1(1) of the *ITA*. The CRA also explained that she had the right to object to those assessments within 90 days.

[8] The Applicant replied to the CRA in a letter dated February 8, 2017, explaining that the CRA was barred from recovering that amount because it had failed to commence an action or proceeding within the two years since she had ceased to be a director of the Corporation, pursuant to subsection 227.1(4) of the *ITA*. The Applicant explained that on December 4, 2012, she had communicated her resignation to individuals within and outside the Corporation, and was relying on the Representatives to follow the formal steps in effecting her resignation and dissolving the Corporation.

[9] In a letter dated March 2, 2017, the Delegate explained that the CRA could not accept the Applicant's objection to the notice of assessment because it had not been filed within 90 days. Furthermore, an application for an extension of time to file an objection must be made within one year of the expiration of the time limit to file an objection, and she was too late for such an extension.

[10] On June 20, 2017, the Applicant filed an application for judicial review of the Delegate's decision. She submits that the Delegate had discretion to vacate or reconsider the Assessments, pursuant to subsection 227(10) of the *ITA*, but failed to consider her unique circumstances and provide reasons justifying his refusal to exercise that discretion.

[11] The Respondent submits that the Delegate did not have discretion to consider reassessing or vacating the Assessments and that the Federal Court has no jurisdiction over this matter.

III. Issue

[12] The issues are:

A. Does the Delegate have discretion to vacate or reconsider the Assessments under subsection 227(10) of the *ITA*, such that this matter is within the jurisdiction of the Federal Court?
B. If so, was the Delegate's exercise of his discretion reasonable?

IV. Analysis

A. *Does the Delegate have discretion to vacate or reconsider the Assessments under subsection 227(10) of the ITA, such that this matter is within the jurisdiction of the Federal Court?*

[13] The Federal Court has jurisdiction to hear applications for judicial review from federal boards, commissions or other tribunals and the Minister of National Revenue (the "Minister") and her delegates belong to this class of entities; their decisions can be reviewed in appropriate circumstances provided the matter is not otherwise appealable (*Federal Courts Act* at s 18.5; *Canada v Addison & Leyen Ltd*, 2007 SCC 33 [*Addison*] at para 8).

[14] The Tax Court has exclusive original jurisdiction to hear and determine references and appeals on matters arising under the *ITA* when references or appeals to the Tax Court are provided for in that statute, which includes attacks on validity of assessments or relating to the correction of assessments, and the Minister's legal authority to make such assessments (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 [*JP Morgan*] at para 82; *Minister of National Revenue v Parsons*, [1984] 2 FC 331 (FCA) at paras 2-3; *Tax Court of Canada Act*, RSC 1985, c T-2 [*Tax Court of Canada Act*] at s 12(1)).

[15] Moreover, the Federal Court does not acquire jurisdiction in matters of income tax assessments simply because a taxpayer has failed to avail him or herself of the procedures of objection and appeal given under the *ITA* (*Canada v Roitman*, 2006 FCA 266 at para 26).

[16] On issues of jurisdiction between the Federal Court and Tax Court, the first step is a characterization of the essential nature of the claim (*Canada v Domtar Inc*, 2009 FCA 218 at para 26). This characterization must be based on a realistic appreciation of the practical result sought by the claimant by reading the application holistically and practically without fastening onto matters of form (*JP Morgan* at para 50).

[17] The Federal Court does not have jurisdiction to vary, set aside or vacate assessments; if the essential character of the relief sought is the setting aside or the vacating of an assessment, it must be struck (*JP Morgan* at para 93). Indeed, cases dealing with the efficacy of a resignation in the context of director's liability routinely come before the Tax Court, not the Federal Court (for example, see *Canada v Chriss*, 2016 FCA 236).

[18] The Applicant attempts to frame this as an administrative law claim. She submits that section 152(8) of the *ITA* does not apply on the facts of this case, and the use of the word "may" in subsection 227(10) of the *ITA* provides the Minister with the discretion necessary to rectify the Assessments:

> **152 (8)** An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.
>
> **227 (10)** The Minister may at any time assess any amount payable under
>
> […] section 227.1 […] by a person,
>
> […] and, where the Minister sends a notice of assessment to that person or partnership, Divisions I and J of Part I apply with any modifications that the circumstances require.

[19] The Applicant states that she is not contesting the validity of the assessment, or that she is out of time to object or obtain an extension.

[20] The Applicant relies on the case of *Lornport Investments Ltd v Canada*, [1992] FCJ No 201 (FCA) at paragraph 7:

> […] Although, as I have already indicated, the statutory framework supports the appellant's submission that the second assessment stood until it was set aside, in my view subsection 152(8) does not support that contention. It seems to me that it is not addressed to a situation where an assessment is issued out of time but rather to a situation where an assessment is issued in time but contains an "error, defect or omission" or that such is contained in any proceeding under the Act relating to it.

[21] As such, the Applicant argues that subsection 152(8) of the *ITA* does not apply to the assessment in this case, given that the assessments were made out of time, in being issued more than two years after she effectively ceased being a director of the Corporation. The Minister therefore failed to even consider exercising her discretion under subsection 227(10) of the *ITA*, resulting in an unreasonable failure to exercise any discretion.

[22] The Respondent argues that the only purpose for the relief sought by the Applicant is to serve as a foundation to set aside or vary the assessment for taxes made by the Delegate – such relief cannot be divorced from the substantial question as to the validity of the assessments themselves (*Walsh v Minister of National Revenue*, 2006 FC 56 at para 5).

[23] Moreover, the Respondent states that the Applicant is essentially seeking an order vacating the assessments, no matter how she couches her request for judicial review – and that the procedural provisions of the *ITA*, including these relating to statutory limitation periods, are properly dealt with in the context of the exclusive jurisdiction of the Tax Court (*Tax Court of Canada Act* at s 12(1); *Ereiser v Canada*, 2013 FCA 20 at paras 21, 22, 27-31).

[24] With respect to subsection 227(10) of the *ITA*, the Federal Court of Appeal in *JP Morgan* stated at paragraph 109:

> In my view, in these circumstances, the Minister did not exercise any discretion independent of the assessment. Therefore, there was no discretion that could be abused. The word "may" in subsection 227(10), the authority for the assessment here, does not vest the Minister with a general, sweeping discretion not to assess tax. Rather, it allows the Minister to forego making a formal assessment of Part XIII tax in situations where the tax was properly withheld and remitted.

[Emphasis added]

[25] Subsection 227(10) of the *ITA* does not grant the Minister a general discretionary power to not assess taxes, nor does it grant a discretion to vacate or reconsider assessments.

[26] Given a purposive construction, the essence of this application is to have the decision of the Delegate vacated, and implicitly, if not directly, is an attack on the validity of the Assessments. The Applicant requests that the Court refer to matter back to the Minister for reconsideration of her request to vacate the Assessments, as well as a declaration that the Minister's assessment was invalid.

[27] The Applicant failed to avail herself, within the requisite timeframe, of the objection and appeal procedures that were available to her. Once the notice of assessment for director's liability had been sent, Divisions I and J of Part I of the *ITA* were applicable (*ITA* at s 227(10)). Those divisions include the *ITA*'s objection and appeal procedures, which "constitute a complete appeal procedure that allows taxpayers to raise in the Tax Court all issues relating to the correctness of the assessments" (*JP Morgan* at para 82).

[28] Applicants cannot argue that a failure to consider a notice of objection that was not filed on a timely basis takes this matter out of the statutory scheme contained in the *ITA* and out of the specialized expertise of the Tax Court (*Canada (National Revenue) v ConocoPhillips Canada Resources Corp*, 2014 FCA 297 at para 10).

[29] As the Supreme Court of Canada stated in *Addison* at paragraph 11:

> Reviewing courts should be very cautious in authorizing judicial review in such circumstances. The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. Judicial review should remain a remedy of last resort in this context.

[30] As I stated above, in my view, the application is, in its essence, an attack on the validity of the Assessments, rather than a cognizable administrative law claim. The Federal Court does not have jurisdiction over this matter.

[31] Given my decision above, I need not decide whether the Delegate's exercise of his discretion was reasonable.

[32] The application is dismissed. The parties agreed at the hearing that the successful party should be entitled to costs of $2500.00 as a lump sum award, together with reasonable disbursements.

JUDGMENT in T-882-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. Costs to the Respondent in the lump sum amount of $2500.00 plus reasonable disbursements.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jason Rosen	FOR THE APPLICANT
Laurent Bartleman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Rosen Kirshen Tax Law Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT