Federal Court  Cour fédérale

Date: 20181019

Docket: T-387-16

Citation: 2018 FC 1044

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 19, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

6075240 CANADA INC.

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR ORDER

[1] The applicant filed a motion to obtain the Court's permission to amend its proceeding to add the 2012 taxation year and to clarify the treatment of the assessment for the 2009 taxation year, for which consent to judgment was previously given on October 23, 2017. I allow the motion for 2012 and dismiss the motion to add the assessment for 2009 for the following reasons.

I. **Facts**

A. Background

[2] The applicant did not file her tax returns for the 2008, 2009, 2010, 2011 or 2012 taxation years within the time limits prescribed by the *Income Tax Act*, RSC 1985, c. 1 (5th Supp.) (the Act). The Minister of National Revenue therefore established an arbitrary assessment for each of those years under subsection 152(7) of the Act. The limitation period for making a reassessment is three years under subsection 152(3.1) of the Act.

[3] The applicant filed new returns for 2008 and 2011 within the three-year limitation period. The Canada Revenue Agency (CRA) processed those returns and issued reassessments determining that no income tax needed to be paid for those years. Those years have never been part of the dispute.

[4] The Minister established the arbitrary assessment for the 2009 taxation year on November 8, 2010. The three-year limitation period for making a reassessment was November 8, 2013. When the applicant filed her 2009 tax return on June 27, 2013, and tried to send it electronically, a message indicated that the CRA could not accept it because the CRA had already received her 2009 tax return. It appeared that the return that had already been received was the arbitrary assessment made by the Minister. The applicant eventually learned that the CRA had actually not received this assessment when the CRA took collection measures against it.

[5] On January 14, 2015, the applicant filed its return for the 2009 taxation year again on paper to try to resolve the situation. On February 18, 2015, the CRA informed the applicant that it could not process the return as it had not been received within three years of the arbitrary assessment. On January 28, 2016, further to a complaint by the applicant concerning the misleading nature of the message received on June 27, 2013, the CRA maintained its position that it would not process the return.

[6] The Minister made the arbitrary assessment for the 2010 taxation year on April 10, 2012. The limitation period for making a reassessment was therefore April 10, 2015. On September 2, 2015, the applicant filed its return for the 2010 taxation year. The CRA refused to process the return since it had not been received within three years of the arbitrary assessment.

[7] The proceeding related to this application, dated February 26, 2016, thus originally concerned the assessments for the 2009 and 2010 taxation years. The applicant asked for the judicial review of the CRA's decision dated January 28, 2016, not to process the return for the 2009 taxation year despite the message received within the three-year period. It added to its application the refusal to process its return for the 2010 taxation year.

[8] The applicant argues that it is still required to file its income tax return despite the arbitrary assessment. The Minister therefore has the obligation to process the return filed. The Minister argues, on the other hand, that he cannot reassess outside the period set out in the Act. It is therefore impossible for him to process the return as it cannot lead to a reassessment.

[9] On March 31, 2016, the respondent brought a motion to strike the application for judicial review as it discloses no reasonable cause of action. According to the respondent, the Court cannot ask the Minister to issue a reassessment outside the three-year period provided for in the Act. As the Court cannot grant the requested measure, the respondent considers that the application discloses no reasonable cause.

[10] On April 18, 2016, a prothonotary of the Federal Court ordered the striking of the application for judicial review on the respondent's grounds. On June 27, 2016, a Federal Court judge allowed the applicant's appeal in part: *6075240 Canada Inc v Canada (National Revenue)*, 2016 FC 726. The judge maintained that the Court could not order the Minister to issue a reassessment not permitted by the Act and therefore dismissed the appeal with respect to the 2010 taxation year. However, the judge allowed the appeal for the 2009 taxation year in order to allow the applicant to proceed with the arguments concerning the message received on June 27, 2013.

[11] The applicant then appealed this decision to the Federal Court of Appeal. On July 19, 2017, the Court of Appeal allowed the appeal and dismissed the respondent's motion: *6075240 Canada Inc v Canada (National Revenue)*, 2017 FCA 158. The Court of Appeal indicated that, in a motion to strike, the Federal Court does not need to deal with the substantive issue, and that the possibility of a strong defence does not justify the summary dismissal of a case. The Court of Appeal added that the applicant's interpretation of the Act must be considered. The Court of Appeal therefore set aside the Federal Court's orders dismissing the motion for the 2010 taxation year.

[12] On October 6, 2017, the applicant and the respondent applied for consent to judgment which, among other things, would allow the application for judicial review for the 2009 taxation year and order the Minister to assess that return. On October 23, 2017, the Court ordered as requested. The application for judicial review therefore continues only for the 2010 taxation year.

B. Motion

[13] On May 30, 2018, the applicant filed a notice of motion to seek permission to amend its proceeding to add 2012 and clarify the treatment of the assessment for the 2009 taxation year. The parties submitted their arguments for the motion to the Court on September 12, 2018.

(1) The 2012 taxation year

[14] On May 28, 2014, the Minister made an arbitrary assessment for the 2012 taxation year. The limitation period for making a reassessment was therefore May 28, 2017. On March 13, 2018, the applicant filed its return for the 2012 taxation year. On April 13, 2018, the CRA refused to process that return, because it was not received within three years of the arbitrary assessment.

(2) The 2009 taxation year

[15] On December 15, 2017, the CRA sent a reassessment showing a credit of $14,823.01 for the 2009 taxation year. However, the assessment explained that, under subsection 164(1) of the

Act, the refund could not be sent because the return had not been filed within three years of the end of the taxation year, which was December 31, 2012.

[16] On February 16, 2018, the applicant asked for more clarifications. On March 9, 2018, the CRA confirmed the information contained in the assessment, namely, that , under subsection 164(1), it was impossible to make a refund. In that message, the CRA accepted the date of the attempt to file electronically, that is, June 27, 2013, as the effective date of the return for the 2009 tax year. However, that date was more than five months after December 31, 2012.

[17] At the motion hearing, the Court learned for the first time that the respondent had suggested, for the resulting credit, that the applicant submit an application under subsection 221.2(1) of the Act to reallocate that amount to the applicant's other amounts payable. The applicant confirmed that it had made the request, but had not yet received a response.

II. **Issues**

[18] The applicant requests that the Court allow it to do two things:

A. Amend its proceeding to add the 2012 taxation year; and

B. Amend its proceeding to add the 2009 taxation year and clarify its treatment.

[19] The respondent claims that the motion raises a single issue:

A. Can the applicant amend its application to add the two new issues related to the judicial review of two separate decisions?

[20] In reality, the motion raises the following two issues:

A. Can the applicant amend its application to add a taxation year that raises the same legal issue?

B. Can the applicant amend its application to add a taxation year for which it has become necessary to clarify the treatment of the assessment relating to consent to judgment?

III. **Analysis**

[21] At the motion hearing, the parties confirmed that the legal analysis for amending proceedings flows from *Canderel Ltd v Canada (1993)*, [1994] 1 FC 3, 157 NR 380 (FCA) [*Canderel*]. Thus, "the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real question in controversy between the parties, provided, notably, to do so would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice".

[22] Regarding the interests of justice, the Federal Court of Appeal specified four factors in *Jannsen Inc v Abbvie Corporation*, 2014 FCA 242, 131 CPR (4th) 128 [*Jannsen*], at paragraph 3:

- timeliness of the motion to amend;
- extent to which the proposed amendments would delay the matter;
- extent to which a position taken originally has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter; and

- whether the amendments will facilitate the court's consideration of the dispute.

A. 2012 taxation year

(1) Applicant's position

[23] The applicant alleges that, since the 2012 taxation year raises the same legal issue as the 2010 taxation year, namely, the interpretation of rights and obligations under the Act, both taxation years should be heard at the same time in the same court file.

[24] At the hearing, the applicant alleged that no injustice would result from allowing the amendment because, if the CRA has to deal with the 2010 application following the judicial review, it will also have to deal with the 2012 application if the applicant requests it. According to the applicant, if injustice results from the application, it could easily be compensated by an award of costs relative to the motion hearing. It is also not in the interests of justice to have multiple separate legal files before the Court to deal with the same issue.

[25] In addition, since the applicant filed the motion to amend diligently, since the applicant has to add only a few allegations without delaying the matter unacceptably, since there is no need to alter any party's course of action and since the issue relates to exactly the same dispute, the applicant alleges that, according to *Jannsen*, the interests of justice suggest that the Court should allow the motion to amend.

[26] In response to the respondent's position, that is, that the applicant has missed the 30-day time limit for an application for judicial review for the decision dated April 13, 2018, not to process the return for the 2012 taxation year, the applicant replied at the hearing that it can always ask the CRA again to process the return and thus obtain a new decision for which it could request judicial review. However, the applicant maintains that it is not in the interests of justice to open a new legal file for each of the CRA's refusals related to the same dispute and the same applicant.

[27] In response to the respondent's position that, even though the legal issue is the same, the facts and the taxation years are different, the applicant claims that the different facts are minimal; indeed, there are just a few different dates to reflect the new year.

(2) Respondent's position

[28] The respondent claims that the applicant did not meet the criteria stated in *Canderel*. First, the amendment aims to add an issue that is really a new application for judicial review, outside of the prescribed 30-day time limit; avoiding this rule deprives the respondent of the right to plead the time limit and thus causes irreparable harm. According to the respondent, that harm is not capable of being compensated by costs.

[29] The respondent also alleges that the amendment does not serve the interests of justice because it would delay the judicial process since the file is now ready for a hearing to be scheduled. In addition, the respondent claims that there is a complete lack of shared facts between the amendment and the original file. Even though the issue is the same, the respondent

insists that the facts are different. Indeed, according to the applicant, the amendment aims to institute judicial review of a decision dated April 13, 2018, which had therefore not been rendered when the applicant filed the original application on February 26, 2016.

(3) Analysis

[30] The review affirmed in *Janssen*, that is, whether the interests of justice are better served by allowing or dismissing the motion to amend, favours the applicant. Should the applicant be successful in its judicial review for the 2010 taxation year and be entitled to a reassessment, it would, at that point, be prevented from a disallowed reassessment for the 2012 taxation year.

[31] The FCA's statements made at paragraph 18 of its decision in this file cannot be ignored: "It seems to me that a construction of the Act [proposed by the applicant] calls for an examination." If this interpretation relates as much to the 2012 taxation year as to 2010, the interests of justice favour allowing the motion to amend in order to ensure that the interpretation is applicable to both years.

[32] The respondent's allegations concerning harm, the interests of justice and the lack of shared facts are not sufficiently persuasive to alter that balance. Even if the Court accepts that depriving the respondent of the right to plead the 30-day time limit for an application for judicial review, the respondent offered no statements explaining why this harm cannot be compensated by costs. The respondent would have to defend an application for judicial review if only by proving that the time limit had expired. That defence would be compensable only by costs. It is unclear why the same thing cannot be true for the amendment in this trial.

[33] Although the parties have completed their evidence, *Canderel* can be distinguished: in *Canderel*, the motion to amend was filed on the sixth day of hearings. At that stage, not only the evidence had been completed, but the respondent had also already completed the opening statement and several witnesses had already been heard. The Court's finding merits consideration:

> On the facts of this case, it was open to the Trial Judge to find that the proposed amendment, in the circumstances, manner and time in which it was sought, by its very nature and by its impact on a trial that was coming to an end was an abuse of process.

[34] Considering the issue affirmed by the FCA, that is, whether the interests of justice favour allowing or dismissing the motion to amend, everything militates in favour of allowing the motion. The motion was filed within a reasonable time limit (May 30, 2018, for a decision dated April 13, 2018); the amendment does not seem to cause a delay that is out of the ordinary; and the amendment does not change the fundamental nature of the file.

B. 2009 taxation year

(1) Applicant's position

[35] The applicant claims that the treatment of the return for the 2009 taxation year now raises an unexpected legal issue because the CRA refuses to apply a credit resulting from that return. At the hearing, the applicant clarified that it had never asked for a refund, but that it was simply asking that the credit that had resulted from the treatment of the return for the 2009 taxation year be reflected in its statement of account.

[36] At the hearing, the applicant alleged that no injustice would result from allowing this amendment as the problem may surface in other taxation years in any case. If the CRA must process the return for the 2010 taxation year following the judicial review and refuses to apply the credit resulting from it, the applicant notes that it could then request judicial review of that refusal. The applicant argues, however, that it is not in the interests of justice to have several separate files before the Court for what is in reality only one transaction. In addition, if there was any injustice, it would be capable of being compensated by an award of costs.

[37] The applicant also alleged at the hearing that the factors listed in *Jannsen* suggest that the Court should grant the motion for that amendment as well. The applicant alleges that it filed the motion to amend diligently; although it cannot confirm the exact time limit to complete that amendment, the applicant alleges that it should not unduly delay the file; the applicant claims that, if there is a position that has changed since the start of the file, it is that of the CRA, who now refuses to apply the credit; and the applicant alleges that the amendment would make it possible to settle the file entirely, thus preventing the Court from splitting the problem into several parts and dealing with them at different times.

[38] In response to the respondent's position that the applicant had missed the 30-day time limit for an application for judicial review of the decision dated December 15, 2017, not to refund the credit for the 2009 taxation year, the applicant replied at the hearing that it can always ask the CRA again to credit its account and request judicial review of the new refusal. The applicant argues again that it is not in the interests of justice to open a new file for each refusal based on the same problem.

(2) Respondent's position

[39] The respondent claims that the applicant does not meet the criteria stated in *Canderel* for the same reasons as stated for the amendment for the 2009 taxation year. In summary, the respondent alleges that, through this motion, the applicant is seeking new judicial review of a decision dated December 15, 2017, that is, before the applicant had filed its original application.

(3) Analysis

[40] The applicant has already asked the CRA for an administrative remedy for the 2009 taxation year. If the CRA grants that remedy to it, the amendment will have been allowed unnecessarily. If the CRA refuses to grant the remedy, it would then have a decision raising a question of law that is entirely different from even if related to the issue at the basis of this application. That decision could be subject to a different application for judicial review in order to allow the Court to consider only that issue. The motion is thus early.

IV. **Conclusion**

[41] The applicant wishes that all of the disputed assessments between it and the respondent be dealt with under the same file. For the 2012 taxation year, the file before the Court may resolve both years.

[42] For the 2009 taxation year, the applicant must wait for the CRA to make a decision about its administrative request to reallocate the credit. That decision will either settle the 2009

taxation year without needing to resort to the Court or present a new decision, which in turn can be subject to judicial review.

[43] Since the result is divided, I am of the view that costs should be in the cause.

ORDER

THE COURT ORDERS that the motion is allowed with respect to the amendment of the proceeding to add the assessment for the 2012 taxation year to the file. The motion to add the assessment for the 2009 taxation year is dismissed. Costs will be in the cause.

"Richard G. Mosley"
Mosley J.

Certified true translation
This 6th day of November 2018
Margarita Gorbounova, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-387-16
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