Date: 20081103

Docket: T-2176-05

Citation: 2008 FC 1217

Ottawa, Ontario, November 3, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

JOHN BERGET

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a "fairness" decision of the Minister of National Revenue (the Minister) denying the applicant's request to reassess the applicant's 1997 and 1998 tax returns pursuant to subsection 152(4.2) of the *Income Tax Act*, 1985, c.1, (5th Supp), (the Act). The applicant requested that the Minister remove $1,106,000 from the applicant's income for the 1997 tax year and $125,000 from the applicant's income for the 1998 tax year, on the basis that this income was never received. The Minister, by way of the "Fairness Committee," found that there was insufficient proof that these amounts were not paid to the applicant and thus denied the request.

FACTS

[2] The applicant is the President of Southland Development Corp, which is in the business of real estate development in Alberta. At all times material to this application, the applicant was also a Director of Southland Development Corp. ("Southland"). Southland is owned by companies related to the applicant.

[3] The accounting firm of Coopers & Lybrand, subsequently known as Price Waterhouse Coopers (the "former accountants"), prepared financial statements and tax returns for Southland for the 1996-1999 tax years, and for the applicant for the 1997 and 1998 tax years.

[4] In preparing the financial statements and T2 corporate income tax returns for Southland for the 1996 tax year, the former accountants deducted as an expense an accrued amount of "Director's Fees," payable to the applicant, in the amount of $1,106,000. This amount was reported as taxable income on the applicant's personal income tax return for the 1997 tax year (the "1997 Director's Fee"). Southland's 1998 tax return, prepared by the former accountants, deducted an accrued amount of $125,000 in "Director's Fees." This amount was reported as taxable income on the applicant's 1998 personal income tax return (the "1998 Director's Fee").

[5] The applicant states that he has never been paid any portion of the 1997 or 1998 Director's Fees.

[6] In 2000, on advice of his counsel, the applicant retained another accounting firm, Kingston Ross Pasnak (the "current accountants"), to review his personal, and Southland's corporate financial statements and tax returns, and, where necessary, amend the tax returns previously prepared by the former accountants.

[7] The review conducted by the current accountants resulted in several adjustments. The adjustments relevant to this application were:

a. deleting the 1997 Director's Fee from the applicant's taxable income for the 1997 tax year, and reducing the corresponding credit to the applicant's director's loan account with Southland; and
b. deleting the 1998 director's fee from the applicant's taxable income for the 1998 tax year, and reducing the corresponding credit to the applicant's director's loan account with Southland.

[8] Based upon the advice of the current accountants, Southland and the applicant submitted their adjustment requests to the Minister. These requests were referred to the Minister's Audit section. The request by Southland was pursuant to a voluntary disclosure provision because subsection 152(4.1) of the Act does not apply to corporations.

[9] The Minister audited Southland and issued reassessments for its 1996, 1998, 1999 and 2000 tax years. The reassessments resulted in a credit balance of $399,993.75 owing to Southland. Southland objected to the reassessments. The Minister's appeals officer Brenda

Solo reviewed and ultimately did not allow any of the objections for the corporation Southland. Southland did not appeal to the Tax Court of Canada, as it was entitled to do.

[10] By letter dated February 10, 2004, the applicant requested that the Canada Revenue Agency reassess, pursuant to subsection 152(4.2) of the Act, his 1997 and 1998 tax returns to remove the 1997 and 1998 Director's Fees from his taxable income. Due to her earlier involvement as Appeals Officer in the objection to Southland's corporate reassessment, Ms. Solo was assigned the applicant's request for a refund of taxes paid. She prepared a report for the Fairness Committee consisting of Sandra Foy and Sheila Lusk.

[11] After reviewing the materials and information in her possession, Ms. Solo recommended that the Minister deny the requested reassessment of the applicant's income tax for the 1997 and 1998 years. The Fairness Committee decided, in a letter from Sandra Foy dated November 9, 2005 that the refund fairness request must be denied. The applicant seeks to set aside this decision.

ISSUE

[12] The issue in this application is whether the Minister properly exercised his discretion in refusing the applicant's fairness application to delete the 1997 and 1998 Director's Fees from his personal taxable income in those tax years.

STANDARD OF REVIEW

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question."

[14] In *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153, 334 N.R. 348, the Federal Court of Appeal held that discretionary decisions under s. 152(4.2) of the Income Tax Act are subject to review on a standard of reasonableness. Accordingly, the Court will review this decision on a "reasonableness" standard.

[15] In reviewing the Minister's decision on a standard of reasonableness, the Court is concerned with whether the decision falls within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir*, supra, at paragraph 47.)

ANALYSIS

The legislation for discretionary relief against normal Income Tax Act deadlines for reassessing income tax returns to reduce tax payable

[16] Subsection 152(4.2) of the Act gives the Minister the discretionary authority to make a reassessment or a redetermination beyond the normal three-year reassessment period for a statute-barred tax year, when requested by an individual or a testamentary trust in order to grant a refund or to reduce tax payable. Subsection 152(4.2) provides:

152. (4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining, at any time after the end of the normal reassessment period of a taxpayer who is an individual (other than a trust) or a testamentary trust in respect of a taxation year, the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is ten calendar years after the end of that taxation year,

(*a*) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; and

(*b*) redetermine the amount, if any, deemed by subsection 120(2) or (2.2), 122.5(3), 122.51(2), 122.7(2) or (3), 127.1(1), 127.41(3) or 210.2(3) or (4) to be paid on account of the taxpayer's tax payable under this Part for the year or deemed by subsection 122.61(1) to be an overpayment on account of the taxpayer's liability under this Part for the year.

152. (4.2) Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable — particulier, autre qu'une fiducie, ou fiducie testamentaire — pour une année d'imposition le remboursement auquel le contribuable a droit à ce moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année en vertu de la présente partie, le ministre peut, si le contribuable demande pareille détermination au plus tard le jour qui suit de dix années civiles la fin de cette année d'imposition, à la fois :

a) établir de nouvelles cotisations concernant l'impôt, les intérêts ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie;

b) déterminer de nouveau l'impôt qui est réputé, par les paragraphes 120(2) ou (2.2), 122.5(3), 122.51(2), 122.7(2) ou (3), 127.1(1), 127.41(3) ou 210.2(3) ou (4), avoir été payé au titre de l'impôt payable par le contribuable en vertu de la présente partie pour l'année ou qui est réputé, par le paragraphe 122.61(1), être un paiement en trop au titre des sommes dont le contribuable est redevable en vertu de la présente partie pour l'année.

[17] The Federal Court of Appeal has referred to this subsection as part of a statutory scheme to bring fairness to our tax laws. See *Lanno* (above) per Sharlow J.A. at paragraph 2. In *Lanno* at paragraph 6 Madam Justice Sharlow described the discretionary decision under this subsection:

> 1. this "fairness provision" is to grant relief for taxpayers from the undue hardship caused by the complexity of the tax laws and procedural issues in cases where they

are entitled to a refund or reduction in tax payable but have missed the normal deadlines in the tax law for obtaining such relief;

2. the granting of relief is discretionary;

3. the discretionary decision cannot be appealed to the Tax Court, only to the Federal Court by judicial review; and

4. the decision is subject to a reasonableness standard of review.

[18] In exercising this discretion, the Minister is guided by Information Circular 92-3 (subsequently replaced by IC 07-1), which sets out Guidelines for Refunds or Reduction in Amounts Payable Beyond the Normal Three-Year Period.

[19] Information Circular 92-3 provides that a tax-payer may request in writing that the director of an appropriate district tax office review the situation if the taxpayer disagrees with the fairness decision. In this way, there is a second level of review aside from the original decision. The applicant did not request a second level of review from the November 9, 2005 decision under review, even though expressly invited to do so by the respondent.

The Applicant's Position

[20] The applicant alleges that the Minister erred in denying the fairness application for the following reasons:

a. the Minister ignored income tax law that in order for income from an office or employment to be taxable, it must be received;

b. the Minister ignored materials that establish:

i. The applicant's borrowing and lending of funds to Southland was not a source of income; and

ii. The applicant's true taxable income for 1997 and 1998 tax years as shown in extensive and detailed calculations performed by the current accountants.

c. the Minister exhibited a reasonable bias, because the same Appeals Officer, Ms. Solo, rendered decisions on identical issues for both the applicant and Southland.

The Respondent's Position

[21] After reviewing the applicant's file, Ms. Solo set out the following conclusions in her report to the Fairness Committee as the basis for recommending that the applicant's fairness request be denied:

a. there was a lack of certainty as to the account balance of the "Due to Director" account in Southland at the material times;

b. the applicant did not provide sufficient records to substantiate the credits for the "Due to Director" account for the material taxation years of Southland;

c. amounts posted as debit and credits in the "Due to Director" account were significant over the taxation years of Southland in respect of 1996 to 2000;

d. the personal guarantees of the applicant as Director were not accepted as valid credits in respect of the "Due to Director" account;

e. the applicant voluntarily reported the Director Fees in his 1997 and 1998 income tax returns;

f. the review of Southland's tax returns was not an extensive review of the "Due to Director" account but rather restricted to items outlined in Southland's submission;

g. "the collections diary" revealed a long history of non-compliance by the applicant;

h. it was unclear why Southland would have remitted cheques to the tax department on behalf of the applicant if, at the time of the remittance, the applicant did not believe he was indebted for these taxes; and

i. the applicant proposed arrangements on an ongoing basis to the CRA to pay his personal tax arrears balance in full. These payments were made by Southland and were debited against the "Due to Director" account.

[22] The applicant's total income declared in the 1997 tax return was $1,725,610.80. Attached to this income tax return is a T4A slip from Southland showing income to the applicant in the amount of $1,106,000.00 for director's fees.

The Fairness Committee decision

[23] The Fairness Committee decision under review dated November 9, 2005 from Sandra Foy, Team Leader, Edmonton Tax Service office stated:

> 1. "…we note that substantial debit entries and credit entries have been posted against the Director's loan account for Mr. Berget.
>
> 2. We have requested verification for the substantial credit entries posted against the Director's loan account and have been advised that this documentation is not available.
>
> 3. We have been provided with two versions of entries posted against the director's loan account (from Mr. Berget's former accountants and from his current accountants)… We have noted inconsistencies in the total amounts of debit and credit entries between the two reports.
>
> 4. ….The 1997 T4A slip prepared by Southland.. reports no tax withheld on Mr. Berget's directors' fees. Secondly, through a review of Collections' diary, Mr. Berget is the person who directed that the $1,075,000.00 payments ($700,000.00 of which were NSF) made by Southland be applied against his personal tax liability. It is unclear why Southland would have remitted cheques to the Minister on behalf of Mr. Berget's personal tax liability if Mr. Berget did not believe he owed the tax on the 1997 and 1998 Director's fees.
>
> 5. Mr. Berget has a long history of non-compliance with the Minister dating back to his 1985 taxation year. As well as being in arrears for his 1997 and 1998 year….Mr. Berget has current balances outstanding for his 1999, 2001, 2003 and 2004 taxation years…
>
> 6. There is uncertainty in what the exact balance of the Director's loan account is at any point in time due to the fact that supporting documentation cannot be provided. Therefore, I am unable to accept your position that a credit balance has always been maintained. Your

> position that a draw down of the Director's loan has not occurred remains unsubstantiated.

[24] The November 9, 2005 decision concluded:

> "The documentation provided is insufficient to determine the exact balance of the Director's loan account at any point in time. Therefore, I deny your fairness request on the basis that supporting documentation has not been provided to demonstrate that Mr. Berget did not receive the bonus income he reported in his 1997 and 1998 taxation years."

[25] The fairness decision letter then invited the applicant to request a second review of the decision by the Director of the Edmonton Tax Services office. The applicant did not request a second review.

The Court's conclusion

[26] The Court has reviewed the five volumes of evidence with respect to the applicant's request for a refund of taxes for the 1997 and 1998 tax years. The evidence establishes that there were hundreds of payments to the applicant from the Southland loan account over the material time period. The evidence also establishes that the applicant's personal tax returns for 1997 and 1998 showed employment income as "director's fees" in the amount of $1,106,000.00 and $125,000 respectively. From reviewing the evidence, the Court is satisfied that this decision was reasonably open to the Fairness Committee Team Leader, Sandra Foy for the following reasons:

1. the ledger entries show hundreds of credits to the Southland loan account in favour of the applicant over the material time period. These reflect payments from Southland to the applicant or to companies related to the applicant. For the two

taxation years in question, the payments to the applicant exceed the amount of the Director's fees declared as income by the applicant, and deducted as an expense by Southland for those years;

2. the evidence is that the applicant declared this income on his personal tax returns and paid taxes on these amounts. The applicant would not declare $1.1 million as income from director's fees and pay taxes on this income unless he believed he received this income in some form; and

3. the evidence is that Coopers Lybrand, a highly respected national accounting firm, prepared the financial statements for Southland, prepared the tax returns for Southland, and prepared the personal tax returns for the applicant. These returns and financial statements were prepared contemporaneously with the events that happened during those time periods. The work done by the current accountants is after the fact and is revisionist. If Coopers Lybrand was, incorrect, negligent or incompetent in preparing these financial statements and income tax returns, then Coopers Lybrand should have been held accountable. There is no evidence that Coopers Lybrand was negligent or wrong in preparing these financial statements and tax returns, or was confronted and held accountable by the applicant or the applicant's new accountants for these personal tax returns which erroneously declared $1.1 million and $125,000 as income in 1997 and 1998 respectively.

[27] In *Gagné v. The Attorney General of Canada*, 2006 FC1523 where Mr. Justice Michel Beaudry, on a similar application for judicial review from a decision under subsection 152(4.2) of the Act, held at paragraph 24:

> "In my view, it was entirely reasonable for the taxation authorities to deny the applicants' request in the absence of relevant supporting documentation that would have clearly distinguished the applicants' personal expenses from his employment expenses and from expenses claimed from the business…"

[28] In this case I am satisfied that the tax officer preparing a report for the Fairness Committee worked with concentration, dedicated effort and in a thorough manner to resolve the problem from February 10, 2004 (when the fairness request was submitted) until the decision was made on November 9, 2005. The hard work is evidenced in the 1,378 pages before the Fairness Committee, now before the Court. These pages contain detailed and complex information. There is difficulty reconciling the conclusions of the former accountants with the new accountants. There were countless meetings between the tax officer and the lawyers for the applicant. The tax officer asked detailed questions time and time again setting out concerns which were not satisfied.

[29] Southland had sales for the relevant tax years in excess of $7 million in 1996, $11 million in 1997 and $13 million in 1998. This money flowed in and out of many accounts including to the applicant. While the applicant may be sincere, honest, hardworking and a genius in real estate development, the accounting of the revenue, expenses, fees and other

transfers between himself personally and his related companies was not clear and made the reconciliation of his contentions with the tax records impossible.

[30] Accordingly, the Court finds reasonable the Fairness Committee decision that the evidence fails to establish that the applicant did not receive the director's fees from Southland in 1997 and 1998. The applicant has the onus of proving his case, which he could not do even though the tax officer Ms. Solo gave the applicant's counsel repeated opportunities.

Apprehension of Bias

[31] In this case the respondent carefully and thoroughly considered the fairness request for a refund after the three year time limit.

[32] In applying the duty to act fairly under subsection 152(4.2) neither Parliament nor the Minister have established an independent tribunal or independent person to consider applications for refunds after the normal deadline under the *Income Tax Act* has expired for reassessments. Accordingly, the person at the tax department familiar with a particular subject matter or particular file can be expected to be the resource person on such an application. The fact that the official is familiar with the file and has made decisions on related matters does not mean that that person is biased. That person is informed. The Court rejects the applicant's submission that the tax officer, Ms. Solo, who worked on this case, breached the duty of fairness because of bias or a reasonable apprehension of bias since she was familiar with the file and had made related decisions.

[33] Ms. Solo, the tax officer familiar with the complex file, prepared a report for the Fairness Committee. The Fairness Committee decided the case on November 9, 2005. The Fairness Committee is independent of the appeals officer. In any event, the Fairness Committee invited the applicant to further appeal to the independent "second level of review", which the applicant did not do. The applicant has no grounds to claim bias since he did not exercise his right to an independent review.

[34] Subsection 152(4.2) of the Act is a fairness provision in that the Minister must consider a request for a refund after the three year deadline. It does not require that the respondent assign a new person unfamiliar with the complex file to prepare background information and a recommendation for the "fairness committee".

[35] Moreover, the applicant waived his right to argue bias by not objecting at the outset in 2004 when he realized Ms. Solo would be the tax officer working on the request.

[36] For the foregoing reasons, the Court must dismiss this application for judicial review. There will be no order as to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Douglas Forer	FOR THE APPLICANT
Ms. Margaret McCabe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McLennan Ross LLP Edmonton, AB	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, ON	FOR THE RESPONDENT