Date: 20081125

Docket: T-1429-07

Citation: 2008 FC 1317

Ottawa, Ontario, November 25, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MARIANNE P. TAYLOR

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AND CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of a decision under subsection 152(4.2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp), as amended (the Act) wherein the Minister's delegate denied Marianne Taylor's (the applicant) request for a refund of the tax she paid on the income that has since been re-assigned to Robert Taylor (the applicant's husband).

[2] The applicant requested that the following relief be granted:

a) an order directing the Canada Revenue Agency (CRA) to issue a refund to the applicant for the amount of tax that was paid on the income re-assigned to her husband together with interest and penalties arising prior to payment and interest accruing after payment; or in the alternative

b) an order setting aside the decision of the Minister in this matter and referring it back for determination, in accordance with such directions as this honourable Court considers appropriate including a reasonable time limit of 60 days; and

c) costs to the applicant on a solicitor-client basis.

Background

[3] The applicant's husband was found guilty in the criminal justice system of embezzling four million dollars from his employer (Fabco Inc.) over a period of about 20 years. To hide the embezzlement, the applicant's husband set up a system whereby he would funnel the embezzled monies through his brother's company, Landak Management Limited. Landak Management Limited would then funnel the money less $1,500 through to Vincent Enterprises. The applicant is the sole shareholder of Vincent Enterprises and she received employment income and dividends from the company. The applicant's husband was not found to be grossly negligent because taxes were paid on the embezzled funds through the applicant's income from Vincent Enterprises.

[4] Once the scheme was discovered, officials at the CRA reassessed the applicant's husband under subsection 56(2) of the Act for funds embezzled from his employer and received by Vincent Enterprises for the period of 1995 to 1998, totalling just under $1.5 million. It appears that the applicant and her husband filed for bankruptcy on December 29, 1999 indicating the CRA as the sole creditor.

[5] The applicant filed her first request for a refund of income taxes paid from 1985 to 1998 on June 30, 2003 (the first request). On May 27, 2004, CRA informed the applicant that her request had been denied. The applicant then made a second request on July 5, 2004 (the second request). On August 27, 2004, the applicant was informed that her request could not be dealt with because of an ongoing appeal before the Tax Court of Canada relating to the matter. On January 31, 2006, the applicant reactivated her second request, but limited the claim to the period from 1995 to 1998. On July 5, 2007, the Minister's delegate denied the applicant's second request. This is the judicial review of the Minister's delegate's decision.

Minister's Delegate's Decision

[6] In his decision dated July 5, 2007, the Minister's delegate denied the applicant's request for a refund. The most relevant portion of the decision reads as follows:

> A thorough review of the account has been completed and I have considered all comments in your representative's letters. The Fairness Legislation gives the Minister discretion to waive or cancel all or part of any penalty or interest payable. This is the case where the penalty or interest resulted from extraordinary circumstances, is due mainly to action of the Canada Revenue Agency (CRA), or if

> there is an inability to pay. My review of Information Circular 92-3, paragraph 7 indicates that "The Department will issue a refund or reduce the amount owed if it is satisfied that such a refund or reduction would have been made if the return or request has been filed or made on time, and provided that the necessary assessment is correct by law, and has not been previously allowed."
>
> My review of this matter reveals that the original decision is correct. Based on the information provided, we are not able to process the requested adjustments under the Fairness Legislation. I regret that my reply cannot be more favorable.

Issues

[7] The applicant submitted the following issues for the Court's consideration:

1. Was the issue in front of the Minister's delegate a question of law?
2. Is the standard of review one of correctness?
3. Does subsection 56(2) permit double taxation in these circumstances?

[8] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Minister's delegate commit a reviewable error in choosing not to exercise his discretion?

Applicant's Written Submissions

[9] The applicant submitted that the issue raised is a question of law involving the application of subsection 56(2) of the Act and as such, the appropriate standard of review is correctness (*Canada (Deputy Minister of National Revenue)* v. *Mattel Canada Inc.*, [2001] 2 S.C.R. 100). It was submitted that as the funds were re-assigned from Vincent Enterprises to the applicant's husband, the legal effect pursuant to subsection 56(2) of the Act for tax purposes is that Vincent Enterprises no longer held the taxable income. Thus, after the re-assignment, it was a legal impossibility for the applicant to be in receipt of taxable employment income or taxable dividends. As such, she should be refunded the income tax she paid on her employment income and dividends from Vincent Enterprises. It was submitted that the question at issue is whether subsection 56(2) of the Act can be used to impose double taxation because the effect of denying the applicant's request for a refund is essentially to double tax the same income. It was submitted that the official CRA policy under IT-440R2—Transfer of Rights to Income is that income cannot be taxed twice and should be taxed in the hands of the transferor where the transfer does not constitute a deliberate attempt to evade or avoid tax. It was submitted that the Court of Appeal in *Outerbridge Estate* v. *Canada*, [1991] 1 F.C. 585 found that subsection 56(2) is rooted in the doctrine of "constructive receipt" and is meant to cover cases where a taxpayer seeks to avoid paying tax on money received by arranging to have another party pay the amount for their benefit.

Respondent's Written Submissions

[10] The respondent submitted that the appropriate standard of review for a discretionary decision of the Minister under subsection 152(4.2) of the Act is reasonableness (*Lanno* v. *Canada (Customs & Revenue Agency)*, 2005 D.T.C. 5245; *Gagné* v. *Canada (Attorney General)*, [2006] F.C.J. No. 1911). "A reasonable decision is not necessarily a correct decision, and there can be more than one reasonable decision arising out of the application of a discretionary provision of law to a particular fact situation" (*Tedford* v. *Canada (Attorney General)*, [2006] F.C.J. No. 1685 as cited in *Maloshicky* v. *Canada (Customs and Revenue Agency)*, [2005] F.C.J. No. 1203).

[11] In applying the standard of review of reasonableness to the Minister's delegate's decision, the respondent submitted that the Minister's delegate considered all the facts and circumstances of the case and decided that a refund would not have been made if the applicant's request had been filed during the normal assessing process. It was submitted that the fact that the applicant's husband was reassessed and income from Vincent Enterprises was attributed to him does not change the fact that the applicant received dividends and remuneration from that corporation. It was further argued that the tax treatment of the corporation and the applicant's husband has no relevance to the tax treatment of the applicant.

[12] With regards to the double taxation argument, the respondent submitted that reassessment pursuant to subsection 56(2) of the Act does not result in double taxation. Double taxation only

occurs if a single payment is taxed twice in the hands of the same taxpayer (*Jones* v. *R.* (1996), 96 DTC. 6015 as cited in *Perrault* v. *R.* (1978), 78 DTC. 6272).

[13] And finally, the respondent submitted that the refund requested was too far back in time. The respondent noted that subsection 152(4.2) of the Act does not allow the Minister's delegate to refund taxes and interest more than 10 years after the taxation year ends. The applicant's first request was dated June 30, 2003 and therefore the Minister's delegate could not have refunded taxes paid before taxation year 1993. Moreover, it was submitted that double taxation could not have occurred for any taxation year before 1995 as the applicant's husband was reassessed only for the taxation years from 1995 to 1998.

Analysis and Decision

[14] **Issue 1**

What is the appropriate standard of review?

The applicant submitted that the appropriate standard of review is one of correctness being that the question at issue is legal in nature. The respondent submitted that the courts have already determined that the appropriate standard of review for a discretionary decision of the Minister under subsection 152(4.2) is reasonableness (*Lanno*, above; *Gagné*, above).

[15] In *Lanno* above, at paragraphs 6 and 7, the Federal Court of Appeal provided the following analysis of the appropriate standard of review for a decision of the Minister under subsection 152(4.2), also know as the “fairness package”:

> [6] The reasons in Hillier do not include the "pragmatic and functional analysis" described in *Pushpanathan* v. *Canada (Minister of Employment and Immigration)*, [1998] 1 S.C.R. 982. That analysis, in the context of discretionary decisions under the "fairness package", would require consideration of the following factors:
>
> (1) The fairness package was enacted because Parliament recognized the need for relief from certain provisions of the Income Tax Act that can result in undue hardship because of the complexity of the tax laws and the procedural issues entailed in challenging tax assessments. The granting of relief is discretionary, and cannot be claimed as of right. This factor would point to a standard of review that is more deferential than correctness.
>
> (2) The decision under review cannot be appealed, but it is subject to judicial review by the Federal Court, and it is not protected by a privative clause. That would point to a reasonableness standard.
>
> (3) The decision under review combines fact finding with a consideration of the policy of tax administration, and sometimes questions of law. The expertise of the decision maker is undoubtedly higher than that of the courts in relation to matters of the policy of tax administration. However, the expertise of the decision maker is not higher than that of the courts in relation to questions of law or findings of fact. That would point to a reasonableness standard.
>
> [7] In my view, there is no relevant factor that points to a standard of review that is more deferential than reasonableness. Therefore, I must respectfully disagree with the decisions of the Federal Court in Sharma and Cheng and conclude that the standard of review in this case, as in Hillier, is reasonableness. As the Judge did not apply that standard to the decision under review, it is necessary for this Court to do so.

In my opinion, the same standard of review should be applied in the case at bar. In *Panchyshyn* v. *Canada (Canada Revenue Agency)*, [2008] F.C.J. No. 1241, 2008 FC 996, this Court confirmed that reasonableness remained the standard of review following the decision of *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190. In paragraph 62 of *Dunsmuir* above, if courts have already ascertained the degree of deference to be applied, then an analysis is not required.

[16] While the applicant submitted that the question at issue was a question of law involving the interpretation of subsection 56(2), I disagree. In rendering his decision, the Minister's delegate was not simply asking whether or not the applicant's husband's reassessment had caused double taxation. When rendering a decision under subsection 152(4.2), the Minister's delegate must decide whether the circumstances of the situation call for the exercise of discretion to ensure fairness. The appropriate standard of review in the present case is one of reasonableness.

[17] **Issue 2**

Did the Minister's delegate commit a reviewable error in choosing not to exercise his discretion?

The applicant submitted that the Minister's delegate erred in deciding not to exercise his discretion because by not granting the applicant's request, the result was double taxation. The respondent submitted that the Minister's delegate considered all the evidence and rendered a decision that was reasonable in light of the facts of the case.

[18] Subsection 152(4.2) of the Act is one of many provisions that together form what is often referred to as the "fairness provisions" of the Act. Under this particular subsection, the Minister is given the discretion to grant relief against the operation of certain provisions of the Act. Subsection 152(4.2) reads as follows:

> 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.

[19] In considering whether or not to exercise his discretion, the Minister's delegate considered the following documents:

a) the applicant's first request of June 30, 2003 and the reasons therein;

b) CRA's letter dated September 26, 2003 and the reasons therein;

c) the applicant's letter dated November 11, 2003 and the reasons therein;

d) CRA's letter dated May 27, 2004 and the reasons therein;

e) the applicant's second request dated July 5, 2004 and the reasons therein;

f) CRA's letter dated August 27, 2004, and the reasons therein;

g) the applicant's letter dated January 31, 2006, and the reasons therein;

h) the applicant's letter dated February 3, 2006 and the reasons therein;

i) CRA's fairness request administrative review executive summary memorandum prepared by Anne McFadden, officer from the CRA, on May 8, 2007;

j) CRA's second level fairness request final recommendation memorandum prepared by Anne McFadden, officer from the CRA, on June 25, 2007 and approved by himself on June 28, 2007.

[20] Having carefully reviewed the documents myself, I am satisfied that the Minister's delegate's decision was reasonable. The evidence before the Minister's delegate included the fairness recommendation report resulting from the applicant's first request. In this report, officials from CRA addressed the issues and arguments raised by the applicant in both her request to the CRA and this judicial review, specifically the issue of double taxation. The report in question reads in part:

> From this review, I cannot see that there has been any double taxation which is the basis of the taxpayer's argument. There certainly has been no double taxation from 1985 to 1994, and any amounts reassessed from 1995 to 1998 were effectively eliminated by the bankruptcy. I cannot find any evidence to substantiate that the $4 million dollars that was embezzled by Mr. Taylor was even taxed once, nor that the taxes that were established on what was reported was even paid to the Department.

[21] In light of the evidence before the Minister's delegate, I am satisfied that the decision not to exercise his discretion under subsection 152(4.2) of the Act was open to the Minister's delegate.

The decision is reasonable and I see no reason to interfere with it. I would not grant the judicial review on this ground.

[22] The application for judicial review is therefore dismissed with costs to the respondent.

JUDGMENT

[23] **IT IS ORDERED that** the application for judicial review is dismissed with costs to the respondent.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended:

56(2) A payment or transfer of property made pursuant to the direction of, or with the concurrence of, a taxpayer to some other person for the benefit of the taxpayer or as a benefit that the taxpayer desired to have conferred on the other person (other than by an assignment of any portion of a retirement pension pursuant to section 65.1 of the Canada Pension Plan or a comparable provision of a provincial pension plan as defined in section 3 of that Act or of a prescribed provincial pension plan) shall be included in computing the taxpayer's income to the extent that it would be if the payment or transfer had been made to the taxpayer.	56(2) Tout paiement ou transfert de biens fait, suivant les instructions ou avec l'accord d'un contribuable, à toute autre personne au profit du contribuable ou à titre d'avantage que le contribuable désirait voir accorder à l'autre personne — sauf la cession d'une partie d'une pension de retraite conformément à l'article 65.1 du Régime de pensions du Canada ou à une disposition comparable d'un régime provincial de pensions au sens de l'article 3 de cette loi ou d'un régime provincial de pensions visé par règlement — doit être inclus dans le calcul du revenu du contribuable dans la mesure où il le serait si ce paiement ou transfert avait été fait au contribuable.
. . .	. . .
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	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,

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,

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

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) 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.

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.

FEDERAL COURT

SOLICITORS OF RECORD

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