Date: 20090817

Docket: T-353-07

Citation: 2009 FC 832

OTTAWA, Ontario, August 17, 2009

PRESENT: The Honourable Louis S. Tannenbaum

BETWEEN:

BENJAMIN R. HOFFMAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On February 28, 2007, the Applicant filed an application for judicial review of a decision made by the delegate of the Minister of National Revenue dated January 26, 2007, whereby it was determined that the Applicant's request for additional investment losses for the 1999 taxation year was not substantiated by the documentation provided and consequently resulting in the denial of the Applicant's fairness request. Furthermore, in regard to the Applicant's request to cancel the arrears interest pertaining to the 1998 taxation year, it was determined that no errors were made, consequently it would not be appropriate to cancel the arrears interest on the taxes payable as a result of the Applicant's 1998 reassessments.

[2] The application for judicial review was argued before the undersigned on December 10, 2008, and judgment was reserved. While the matter was under advisement, two additional requests were filed by the Applicant, namely: December 11, 2008 a request to stay the enforcement of taxes already assessed, and December 17, 2008 a request to re-open the hearing that took place on December 10, 2008 to allow the Applicant to present arguments on additional matters. These two additional requests were argued before the undersigned on June 1, 2009, and judgment was reserved.

[3] The Applicant, Benjamin Hoffman, was a resident of Canada operating as a medical doctor up until approximately January 1, 2000.

[4] As of the year 2000 the Applicant ceased to be a Canadian resident.

[5] M. Hoffman was the owner and operator and sole shareholder of 1289423 Ontario Inc., operating as Rocky Mountain Chocolate Factory (RMCF), located in Ottawa.

[6] The Applicant was an arm's length shareholder of Phase Remediation Inc. (Phase) and Newmatic Tools Inc. (Newmatic).

[7] Two previous Allowable Business Investment Loss (ABIL) requests by the Applicant in relation to RMCF were denied in January of 2002 and 2003. In each case, the request was denied due to the absence of supporting documentation.

[8] According to the Fairness Request Summary of Facts, on January 25, 2005, the Canada Revenue Agency (CRA) commenced its first level review of the Applicant's request for fairness.

[9] By letter dated March 13, 2006, the Applicant was advised that CRA was allowing a portion of the original amount claimed and what adjustments were being made.

[10] On August 22, 2006, the Applicant's auditor, David F. Cameron, wrote to CRA in relation to additional ABIL amounts to be claimed in 1999 for RMCF and asking that these amounts be included in the amount approved on the first level review. Mr. Cameron further requested a reduction of arrears interest he claimed was overcharged in the 1998 taxation year.

[11] Subsequently, Mr. Cameron, by letter to CRA, dated October 31, 2006, sought a second review under the fairness provisions.

[12] In a letter received by CRA on December 7, 2006, the Applicant forwarded documentation seeking further adjustments to the ABIL amounts.

[13] Mr. Barry Colpitts carried out a review of the Applicant's request and, on January 24, 2007, recommended that the Applicant's request for additional expenses in respect of losses incurred under paragraph 39(1)(c) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) [ITA], be denied as no evidence was submitted to substantiate the claim. Mr. Colpitts further recommended that the Applicant's request regarding excessive arrears interest in the 1998 taxation year be denied as it was calculated as the prescribed rate in accordance with the outstanding balance on the Applicant's account.

[14] Steve Mombourquette of the Review Committee reviewed the file and, on January 24, 2007, agreed with Mr. Colpitt's recommendation contained in the Fairness Recommendation Report.

[15] Donald Gibson reviewed the file and agreed with the recommendation and, on January 26, 2007, he wrote to the Applicant advising of his decision to deny his request. It is this decision that is the subject of the application for judicial review filed February 28, 2007.

[16] The decision was twofold. First, to not reassess tax payable by the Applicant for the 1999 taxation year by allowing the Applicant to claim further ABIL so as to reduce his tax payable. Second, to deny the Applicant's request to cancel interest accumulated on the Applicant's 1998 tax debt on the basis that excessive interest had been charged by the Canada Revenue Agency.

[17] The Applicant's challenge, as set out in his Memorandum of Facts and Law, is to the merits of the decision in relation to allowable business investment losses. He does not point out any errors made by the minister's delegate in or in reaching his decision. He does not challenge the decision in relation to interest.

[18] The overriding issue in the present case is whether the Minister's delegate made an error in his consideration of the Applicant's request such that the decision ought to be set aside and sent back for redetermination.

[19] The standard to be applied in the present situation is that of reasonableness (*Lanno v. Canada Customs & Revenue Agency* (2005) 334 N.R. 348 (FCA)).

[20] The first issue raised by the Applicant is in regards to the original cost base of the Amalgamated income shares invested in RCMF through a section 85 rollover. The Applicant argues that he has not been granted a residual adjusted cost base. He asserts that it is an ABIL or capital gain.

[21] The Report prepared for the Minister's delegate however provides a detailed analysis of what occurred in relation to these shares. The reviewer concluded that the shares were owned by 1289423 Ont. Inc. and consequently did not belong to the Applicant. In these circumstances the Applicant could not incur any loss in relation to the shares with the result that no adjustment could be made in his ABIL.

[22] The Report and its determinations are reasonable. It was under the CRA's discretion to apply and interpret the facts of the particular situation in order to determine if the Applicant was eligible for such relief.

[23] The Applicant further disputes the finding that certain expenses were not incurred by him and therefore could not form part of his losses. I note that the affidavit of Alexander Hoffman was not part of the material before the decision maker and therefore could not have been considered by him. Moreover, the letter dated March 20, 2007 from Lynn Reierson (the Applicant's lawyer for matters pertaining to his divorce and relating to RMCF), in which she indicates that the Applicant's father would have paid the legal fees, was not according to a reading of the Report prepared for the second review before the Minister when he came to his decision. I do not believe that this evidence constitutes "new evidence" and it should not be considered during this judicial review.

[24] The expenses in question related to certain invoices for accounting and legal services copies of which were provided to the CRA. In relation to the first three invoices, the reviewer concluded that it was not possible to determine whether these were paid by the Applicant personally. In addition the first invoice related to another tax year. The reviewer also reviewed personal and corporate bank account statements and the Applicant's Visa statements in order to verify these payments.

[25] The Report reviewed by the Minister's Delegate clearly demonstrates that all the documents were reviewed and based on such these claimed business expenditures could not qualify for ABIL.

> While payment by the taxpayer of business expenditures may qualify for ABIL treatment for 1998 and 1999 under subsection 50(1), no evidence to substantiate payment was submitted so it is not possible to determine whether payment is made from corporate or personal funds. In addition, any debt incurred by the taxpayer subsequent to the cessation of Ontario Inc.'s business operations (which apparently was in July, 1999) would, technically, not qualify for an ABIL pursuant to subparagraph 40(2)(g)(ii) of the ITA since the debt is not incurred for the purpose of gaining or producing income from a business.
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> (Respondent's Application Record, vol 3, Level 2 Fairness Request, p. 493 at pp. 494-495)

[26] This finding of fact is not unreasonable.

[27] In reading the evidence, it is clear that the CRA carefully weighed the Applicant's request and it was incumbent upon it to make the final decision. The Minister's Delegate was reasonable

when concluding that the Applicant's fairness request should be denied. Accordingly, the application for judicial review respecting the decision of January 26, 2007 will be dismissed.

The Motion to Stay the Collection of Taxes Assessed

[28] There is absolutely no legal basis upon which the Court can grant a stay of enforcement in the present circumstances. The taxes have been assessed and are due and owing notwithstanding the proceedings. The request for a stay will accordingly be dismised.

The Motion to Re-open the Hearing of December 10, 2008

[29] The Applicant requests the re-opening of the hearing of December 10, 2008 for the following reasons:

> "Wherefore, I respectfully requests that the record be reopened as to the hearing of December 10, 2008 and/or extend the time to amend the Notice of Application to allow me to present arguments regarding the evidence in the record before the court involving the Level One Fairness Review dated March 13, 2006 and the Level Two Fairness Review dated January 26, 2007 as to ABIL's claimed by me as to PRI and Neumatics."

[30] The Applicant also states in his argument:

> "I accept Mr. Ashley's argument that I did not raise the issue of the PRI and Neumatic losses directly in my initial application to this court contesting the Level 1 and 2 Fairness Review. I directed the arguments to RMCF which review had been concluded. I did this on the belief that CRA would complete its review of the other ABIL's or loss carrybacks in a timely fashion hopefully obviating the need to further contest RMCF as these other losses would negate the principal remaining tax liability and no refund has been sought."

[31] The Applicant reviews what appear to be the arguments submitted to the undersigned on December 10, 2008. The Applicant acknowledges taxes owing for 1998 and 1999, but maintains that he has been treated unfarily due to the two and a half year delay in reviewing his 2000 tax return (i.e., his final tax return before he emigrated to the United States). His position is that once his 2000 tax return is assessed, the balance owing will be canceled out, thus he does not have to address his existing liability. He also reiterates his position that a payment of $35,000 made on December 15, 1998 was not credited to his account until June 26, 1999. He argues, therefore, that the penalties and/or interest that accrued on the balance for that six month period are unfairly attributed to his account.

[32] The Applicant notes that the hearing before the undersigned focused on the Rocky Mountain business losses and expenses. He states that he did not raise the losses incurred in connection with two other businesses (PRI and Neumatic) as he believed that once his 2000 tax return was accepted by CRA, there would be no outstanding disputes. In fact, the Applicant implies that he and the Respondent had come to an agreement about the issues to be argued before the undersigned. He also notes in his affidavit that the losses are due to a Mareva injunction issued against him as part of divorce proceedings; the value of his holdings in these two companies diminished drastically during the time he was unable to move them.

[33] The Respondent puts forward arguments supporting his position that the motion should be dismissed. He argues that the motion record is defective in that it does not comply with the *Federal Courts Rules* and unacceptably seeks to expand the scope of the underlying application.

[34] The Respondent submits that the Applicant's motion does not comply with Rule and Form 359 in a number of particulars; it does not state any grounds for the motion, the evidence to be relied upon, or the bases on which the motion is made; does not include phone and fax numbers; and the paragraphs in the affidavit are not numbered, and the exhibits are improperly attached.

[35] The Respondent submits that these deficiencies are sufficient grounds for the motion to be dismissed.

[36] The Respondent also submits that the Applicant is attempting to expand the scope of the existing application on two fronts: 1) by challenging the decision of March 13, 2006, which was not noted in the Notice of Application; and (2) by raising additional grounds, apart from the legal and accounting expenses cited in the Notice of Application, for his challenge to the January 26, 2007 decision.

[37] The Respondent submits that the Applicant is attempting to achieve an outcome that should have been dealt with through a motion to extend the time to amend the original Notice of Application, or to extend the time to file a Notice of Application to review the March 13, 2006 decision. The Respondent also points out that challenging two decisions in one application contravenes Rule 302, which limits applications to a single order.

[38] It is difficult to discern from the Applicant's representations what he is seeking, and the bases for his requests. The Applicant's last paragraph requests that the "record be reopened as to the haering of December 10, 2008 to allow me to present arguments regarding the evidence in the record before the court involving the Level One Fairness Review dated March 13, 2006 and the

Level Two Fairness Review dated January 26, 2007 at to ABIL's claimed by me as to PRI and Neumatic." However, it seems to me that this motion was really filed in response to the notice of levy that the Applicant received.

[39] On the issue of re-opening the record, the Applicant's motion could be interpreted as a request either to make additional arguments before the undersigned, or as a request to adduce fresh evidence. On the former interpretation, if the issue is regarding a decision made on March 13, 2006, this is not included in the Notice of Application. He would have to seek leave to add anything to the application at this point. Furthermore, if the evidence regarding PRI and Neumatic was, in fact, contained in the record and relevant to the January 26, 2007 decision under review, then the arguments should have been made on December 10, 2008. Unless a matter cannot be foreseen, it should be argued at the first available opportunity.

[40] The only new document is the notice of levy from the IRS. While it is true that this could not have been adduced on December 10, 2008 because Mr. Hoffman had not yet received it, I do not believe it would influence the mater since the tax liability and the CRA's statutory justification to collect is unaffected.

[41] The Respondent's arguments regarding the failure to comply with Rule 359 and Form 359 merit mention. I believe that allowing new arguments on existing issues at this point would unduly delay the proceedings. The Applicant had the opportunity to address these matters and did not do so. Allowing the Applicant to do so now would not only delay proceedings, but would also unduly prejudice the Respondent.

JUDGMENT

For the above reasons, the COURT ORDERS AND ADJUDGES THAT the Motion to Stay is dismissed; that the Motion to Re-open is dismissed and that the Application for Judicial Review is dismissed.

"Louis S. Tannenbaum"
Deputy Judge

Authorities consulted by the Court

1. *Her Majesty the Queen in Right of Canada as Represented by Canada Customs and Revenue Agency (CCRA) v. Judi Johnson*, 2003 FCT 568;
2. *Communications, Energy and Paperworkers Union of Canada v. Canadian Human Rights et al*; A-698-00;
3. *The Income Tax Act v. Swiftsure Taxi Co. Ltd.*; 2004 FC 980;
4. *Gilbert c. R.* 2007 FCA 254;
5. *Canada v. Fishing Vessel Owner's Association of B.C.*; (1985) 61 N.R. 128;
6. *M.N.R. v. Tomas*, [2007] N.R. Uned. 34;
7. *687764 Alberta Ltd. Operating as West End Health and Home Care Centre v. Minister of Health,* A-280-99;
8. *Pieters v. Canada (Attorney General),* 2004 FC 342;
9. *Smith v. Canada*, 2001 FCA 86;
10. *Pharmacia Inc. et al v. David Bull Laboratories (Canada) Inc. et al*, 64 C.P.R. (3d) 340;
11. *Merck Frosst Canada Inc. Et al v. Canada (Minister of Health) et al*, 76 C.P.R. (3d) 468;
12. *Tajgardoon v. Canada (Minister of Citizenship and Immigration)* [2000] F.C.J. No. 1450;
13. *Merck Frosst Canada Inc. v. Canada (Minister of National Health and Welfare),* 55 C.P.R. (3d) 302;
14. *Merck Frosst Canada Inc. v. Canada (Minister of Health)* [1977] F.C.J. No. 1847;
15. *Lanno v. Canada Customs and Revenue Agency*, (2005), 334 N.R. 348 (FCA);
16. *Dunsmuir v. N.B.* [2008] 1 S.C.R. 190;

17. *Rohm & Haas v. Anti-Dumping Tribunal* (1978), 22 N.R. 175 (FCA);

18. *Barron v. MNR*, (1997) 209 N.R. 392 (FCA).

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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Mr. John J. Ashley	FOR THE RESPONDENT

SOLICITORS OF RECORD:

None	FOR THE APPLICANT
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