Federal Court  Cour fédérale

Date: 20100623

Docket: T-840-08

Citation: 2010 FC 688

Ottawa, Ontario, June 23, 2010

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

CARLYLE LEBLANC

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Minister of National Revenue (the Minister), dated April 28, 2008, concerning deductions allowed relating to the applicant's commission income for the 1998 and 1999 taxation years pursuant to subsection 152(4.2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp) (the Act).

Background

[2] The applicant, Carlyle Leblanc, was a real estate salesman who earned commission income during the period from 1996 to 1999. The applicant's 1996, 1997, 1998 and 1999 taxation years were arbitrarily assessed under subsection 152(7) of the Act. The applicant appealed the assessment of his 1996 and 1997 taxation years to the Tax Court of Canada. At the hearing on October 24, 2002, the Minister and the applicant advised the presiding Judge that they had reached an agreement to settle the appeal. On December 31, 2002, the agreement was finalized, pursuant to subsection 169(3) of Act, by written consent of the applicant to the reassessment proposed by the Minister (the Settlement Agreement).

[3] The applicant sought relief under the taxpayer relief provisions of the Act five times in respect to the 1998 and 1999 taxation years. The Minister considered the requests pursuant to subsection 152(4.2) of the Act. The taxpayer relief decisions dated March 7, 2006 and December 1, 2006, relating to the third and fourth requests were quashed by the Federal Court and returned to the Minister for redetermination. In both instances the Minister brought a motion to the Court for an order allowing the judicial review. With respect to the March 7, 2006 decision, the ground for the motion was that a Canada Revenue Agency (CRA) officer had participated in more than one level of the review, leading to a reasonable apprehension of bias. With respect to December 1, 2006 decision, the ground for the motion was that the CRA officer who signed the decision appeared to be approving his own recommendations, which gave the appearance of a lack of procedural fairness.

[4] The present application for judicial review concerns the fifth and most recent taxpayer relief decision, dated May 2, 2008. In that review, the applicant's request for additional deductions and an adjustment of his net commission income for the 1998 and 1999 taxation years was granted in part (the fairness decision).

[5] The applicant raises a number of grounds in his application for judicial review of the fairness decision. At the hearing, the applicant agreed that the two main grounds warranting the Court's consideration were the following. First, the applicant claims that the fairness decision does not respect the October 24, 2002 Settlement Agreement between the taxpayer and the Minister. Second, the Applicant argues that the Minister erroneously "reused" material from the previous taxpayer relief decisions, which were quashed on procedural fairness grounds.

[6] The applicant seeks the following relief: that the Minister honour the Settlement Agreement; accept the expenses claimed by the applicant for the 1998 and 1999 taxation years; and thereby decrease the applicant's taxable net commission income for those years.

[7] In reply, the respondent argues the decision making process in the fairness decision complied with the principles of procedural fairness. The respondent also argues that once the Minister determined that additional commission expenses would be allowed, there was a wide range of possible outcomes. The amount allowed by the Minister in the fairness decision is both reasonable and defensible.

Issues

[8] The issues in this application for judicial review of the Minister's decision pursuant to subsection 152(4.2) of the Act are as follows:

1. Did the Minister fail to observe the principles of procedural fairness by considering the previous taxpayer relief decisions quashed by the Federal Court?

2. Is the Minister's decision to deny the applicant full relief reasonable? More specifically, was the Minister bound by the terms of the Settlement Agreement in considering the request for relief relating to the 1998 and 1999 taxation years?

Legal Framework

[9] Subsection 152(4.2) of the Act states:

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,	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*) 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.

[10] Subsection 152(4.2) of the Act confers to the Minister the discretionary power to reassess the tax payable by a taxpayer, on the taxpayer's application, after the lapse of the normally allotted time limit for reassessment.

1. Did the Minister fail to observe the principles of procedural fairness by considering the previous taxpayer relief decisions quashed by the Federal Court?

Applicant's position

[11] The applicant argues that the Minister erroneously "reused" material from the previous taxpayer relief decisions, which were quashed. In oral submissions, the applicant acknowledged that there would be no breach of procedural fairness if the CRA officer responsible for the fairness decision "looked at" the findings from previous decisions. However, the applicant argues that it appears on the face of the fairness decision that the CRA officer simply adopted the findings from

the two previous decisions. The applicant contends this is a breach of procedural fairness because these previous decisions were quashed on procedural fairness grounds.

Respondent's position

[12] The respondent argues that the decision at issue was based on following: the applicant's books and records; additional documents provided by the applicant; the policy in Information Circular 07-1; the amount of expenses allowed to the applicant for the 1996 and 1997 taxation years pursuant to the Settlement Agreement; as well as the amount of expenses recommended in support of the previously quashed decisions. The respondent argues that it was proper and reasonable for the Minister to consider the conclusions reached in the prior decisions as they formed part of the factual record. The respondent further argues that nothing in the Act prevents the Minister from examining previous decisions as the Act itself does not provide specific procedural rules for applications made under subsection 152(4.2).

[13] The respondent contends that the Minister did not fetter his discretion by looking at these previous quashed decisions. The respondent further contends that upon examining the fairness decision, it does not appear that the decision-maker was unduly influenced by the previously quashed decisions.

Analysis

[14] As this is an issue of procedural fairness, the standard of review is correctness.

[15] In exercising his discretion under subsection 152(4.2) of the Act, the Minister has a duty to act fairly. Although his powers must be exercised according to the rules of procedural fairness, no specific rules of procedural fairness are set out in the Act with respect to applications for taxpayer relief brought pursuant to subsection 152(4.2) (*Costabile v. Canada (Customs & Revenue Agency)*, 2008 FC 943, at para. 37).

[16] The fairness decision under review rendered on behalf of the Minister by Ken Slawson, Director of the Vancouver Island Tax Services Office, reads:

> After careful consideration, it is agreed to adjust your 1998 and 1999 returns to allow the additional expenses in the Taxpayer Relief decision letter dated December 1, 2006, which have not yet been processed, and to allow additional amounts for motor vehicle expenses under subsection 152(4.2) and the Taxpayer relief provisions. These adjustments are consistent with amounts that were allowed in previous years and considered reasonable.

[17] The fairness decision therefore allowed the applicant the same additional expenses as the previous decision dated December 1, 2006, quashed by the Federal Court. It also allowed additional motor vehicle expenses which were not allowed by the previous decision. The fairness decision was based on the recommendations of the CRA officer, Gwen Antaya, which are found in a report dated April 23, 2008 (the Report). The applicant does not dispute that the CRA officer could consider the previously quashed decisions. The applicant's position is that the CRA officer improperly "reused" the quashed decisions by simply adopting the findings in those decisions. For the reasons set out below, I disagree.

[18] In her Report, the CRA officer describes the steps she took and the documents she reviewed in order to make her recommendations, which are as follows:

> Steps taken:
>
> a. Analyzed the previous entries on the Taxpayer Relief registry.
> b. Reviewed the file transfer documents, DOJ [Department of Justice] counsel letter and deposition of the reviewer for the December 1, 2006 decision that has been set aside.
> c. Contacted the DOJ counsel to confirm that this review is based on the taxpayer's letter dated March 26, 2006 and only the 1998 and 1999 tax years under review.
> d. Entered this review for 1998 and 1999 on the Taxpayer Relief registry.
> e. Created a date line.
> o Read the previous audit and fairness reports noting who prepared the reports and signed the decision letters as well as what adjustments had been made and the reasons for those adjustments.
> f. Reconciled the amounts shown on the comparative figures schedule of amounts claimed and allowed prepared by the December 1, 2006 reviewer to audit reports for 1996, 1997 and 1998 and the previous fairness reviews for 1998 and 1999, the returns filed by the taxpayer and the adjustments processed on the RAPI system. Made adjustments to the schedule as required.
> g. Reviewed copies of the taxpayer's books and records filed with the 1996 to 1999 returns and compared the amounts claimed to the supporting documents.
> h. Considered the amounts reduced or disallowed for reasonableness.
> i. Prepared working papers to support my recommended adjustments.
> j. Prepared a 2nd level Fairness Report and decision letter for my Team Leader to review and initial and for the Director to review and sign.
>
> Documents reviewed:
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> k. Deposition and exhibits of the reviewer for the December 1, 2006 Fairness decision.
> l. Audit reports for 1996 to 1998 in the returns.
> m. Appeals documents for 1996 and 1997.
> n. Fairness reports available for 1998 and 1999.
> o. Books and records provided by the taxpayer for 1998 and 1999:
> i. A detailed expenditure listing on a day to day basis
> ii. Bank statements
> iii. Credit card statement
> iv. Cancelled cheques
> v. BC Hydro statements
> vi. BC Tel statements
> p. IC07-1 Taxpayer Relief Provisions.

[19] The CRA officer considered various documents and previous assessments and decisions, including the two decisions that were quashed by the Federal Court. The CRA officer was clearly aware of the reasons why the latter decisions were quashed, as this is noted in her Report. In considering the underlying reports of the quashed decisions, the CRA officer considered who had prepared the reports and signed the decision letter. With respect to the December 1, 2006 decision, she reviewed the counsel letter and deposition of the reviewer. In my view, this demonstrates that the CRA officer considered the quashed decisions and their underlying reports with appropriate caution, given that these decisions were deemed to be procedurally unfair.

[20] Further, nothing in the fairness decision or in the underlying recommendations leads me to conclude that the previous decisions were holistically applied or relied on exclusively. For each item of deductible expenses claimed by the applicant, the CRA officer considered numerous factors and came to her own conclusion as to the appropriate expenses that should be allowed. This conclusion is supported by the CRA officer's recommendation for motor vehicle expenses. She recommended these expenses be allowed in full, while the two previous quashed decisions had only allowed 68% of the total motor vehicle expenses claimed by the applicant.

[21] Based on the above, I find that the duty to act fairly was not breached by the Minister in rendering the fairness decision.

2. Is the Minister's decision to deny the applicant full relief reasonable? More specifically, was the Minister bound by the terms of the Settlement Agreement in considering the request for relief relating to the 1998 and 1999 taxation years?

Applicant's position

[22] The applicant argues that the Minister was required to respect the terms of the Settlement Agreement in the fairness decision relating to the 1998 and 1999 taxation years. He submits that the taxation years 1998, 1999 and 2000 were captured by the Settlement Agreement by counsel for the Ministers on October 24, 2002, to help "close the deal."

Respondent's position

[23] The respondent argues that on the date the Settlement Agreement was negotiated, the Applicant had not yet appealed his 1998 and 1999 taxation years, and consequently the Settlement Agreement did not address those years. The respondent notes that the applicant received the full details of the Settlement Agreement, which did not provide for the 1998 and 1999 taxation years, and consented to it, as is evidenced by the applicant's signature on the Settlement Agreement. The respondent therefore argues that the Minister was not required to adopt the terms of the Settlement Agreement in the fairness decision concerning the 1998 and 1999 taxation years.

Analysis

[24] With respect to the standard of review, the Federal Court of Appeal in *Lanno v. Canada (CRA)*, 2005 FCA 153, held that the applicable standard of review of a fairness decision of the Minister, under section 152(4.2) of the Act, was reasonableness *simpliciter*. In *Panchyshyn v. Canada (Revenue)*, 2008 FC 996, and in subsequent cases, the Federal Court confirmed that

reasonableness remained the standard of review following the decision of *Dunsmuir v. New Brunswick,* 2008 SCC 9.

[25] A decision made under subsection 152(4.2) of the Act is discretionary. It follows that the scope of judicial review of such decisions is quite narrow. In *Barron v. Canada (Minister of National Revenue – M.N.R.)*, [1997] F.C.J. No. 175 (QL); [1997] 2 C.T.C. 198, at paragraph 5, the Federal Court of Appeal explained the scope of review for such decisions:

> …it may be useful to recall that subsection 152(4.2) of the *Income Tax Act* confers a discretion on the Minister and that, when an application for judicial review is directed against a decision made in the exercise of a discretion, the reviewing court is not called upon to exercise the discretion conferred on the person who made the decision. The court may intervene and set aside the discretionary decision under review only if that decision was made in bad faith, if its author clearly ignored some relevant facts or took into consideration irrelevant facts or if the decision is contrary to law.

[26] The only issue raised by the applicant with respect to reasonableness of the decision is whether the Minister was required to adopt the terms of the Settlement Agreement.

[27] I have considered the Transcript of the proceedings before the Tax Court on October 24, 2002, the Settlement Agreement, and the letter of Joanne Ralla, which the applicant submitted. The evidence supports the Respondent's position that the Settlement Agreement applies only to the 1996 and 1997 taxation years. The Settlement Agreement, signed by the applicant, details only the allowed expenses for the 1996 and 1997 taxation years. Further, when the Settlement Agreement was reached on October 24, 2002, the issue before the Tax Court was the applicant's appeal of the Minister's assessments for the1996 and 1997 taxation years. The applicant had not yet filed his

returns for the1998 and 1999 taxation years. Those taxation years were therefore not at issue. The applicant argues that the Minister included the 1998, 1999 and 2000 taxation years to close the deal with the applicant on October 24, 2002. Apart from his affidavit, the applicant adduced no further evidence to support this contention. Based on the record before me, I find that the Minister was not bound by the terms of the Settlement Agreement in deciding the request for relief relating to the 1998 and 1999 taxation years. In any event, the CRA officer who prepared the recommendation for the fairness decision under review, considered the amounts and percentages of claims allowed for the 1996 and 1997 taxation years pursuant to the Settlement Agreement, in assessing the reasonableness of the business expenditures at issue.

[28] On the basis of the above, I find the fairness decision to be reasonable. In the result, the application for judicial review will be dismissed with costs to the respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed with costs to the respondent.

"Edmond P. Blanchard"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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