Federal Court  Cour fédérale

Date: 20110211

Docket: T-1448-09

Citation: 2011 FC 160

Ottawa, Ontario, February 11, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

DUPONT ROOFING & SHEET METAL INC.

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 of the act of certifying on June 11, 2004 in Federal Court, as Court File No.

6552-04, that the amount of $204,704.21 plus interest from May 15, 2004 is payable by the applicant and has not yet been paid.

BACKGROUND:

[2] The applicant company ("Dupont") was in the roofing business. In 2000, Dupont formed a joint venture with another firm, Applewood Roofing and Sheet Metal Inc. ("Applewood"). Together, they took possession of 94 Kenhar Street in Toronto. For administrative purposes, Applewood occupied unit 16 and Dupont occupied unit 17 at that address but both units were used as a combined work space. Applewood's bookkeeper, Mrs. Manuel, did the record keeping for both companies and they shared a mailbox.

[3] Mr. Luis Gomes, one of the two directors of Dupont, along with Manuel Da Silva, deposed that Applewood controlled all revenues and only transferred to Dupont the net amounts payable to employees. Due to disagreements over payment of Dupont's business expenses, the firms severed ties in August 2003. At the time of separation, Mr. Gomes says Applewood owed Dupont between $200,000 and $250,000. It was acknowledged by Mr. Gomes during his cross-examination that he was aware that this was the approximate amount of money owed in tax debt to the Canada Revenue Agency ("CRA").

[4] On April 4, 2003, CRA Trust Examiner, Mr. Domenic Pizzonia, produced a form of audit document called a "trust report" for Dupont. According to the respondent, it is the normal practice of the CRA to audit those employers, such as Dupont, that are required under the *Income Tax Act*, 1985, c.1 (5th Supp.) ("ITA") to calculate, withhold and remit tax from wages paid to employees. In the trust report attached to Mr. Pizzonia's affidavit, at p. 000268 of the applicant's Book of

Affidavits, it is stated that Dupont was “negligent in filing 2001 and 2002 T4s” and “[A]udit was flagged from T4 Matching”.

[5] In conducting the trust examination, Mr. Pizzonia met with Dupont’s directors, Messers. Gomes and Da Silva and Mrs. Manuel, the bookkeeper. Following a review of the relevant books and records, Mr. Pizzonia calculated the amount of payroll taxes outstanding that the employer was required to collect and remit, including income tax, employment insurance premiums and Canada Pension Plan premiums, plus penalties and interest was $162,550.43. He communicated these results to the applicant’s directors by personally handing over a form at the meeting. Mr. Pizzonia submitted his report to CRA for processing. The matter was then assigned to a Trust Compliance Officer, Mr. Anthony Gentile.

[6] Mr. Gentile’s evidence, supported by the electronic diary entries automatically generated by the CRA database, is that he followed his general practice for causing CRA’s system to issue notices of failures to remit payroll assessments for the 2001 ($38,738.29) and 2002 ($122,672.76) tax years relying upon the information and conclusions in Mr. Pizzonia’s final trust examination report. These were done on April 23, 2003 and April 25, 2003 respectively. The assessment for 2001 had to be manually mailed, according to the CRA practice at the time, for assessments for a taxation year two years prior to the date of the assessment. Mr. Gentile followed his general practice to arrange for a manual mailing through the Toronto North Taxation Centre. The assessment for the 2002 taxation year was generated electronically by the computer to be mailed from the Sudbury Tax Centre. Returned mail containing notices of assessments generated by Mr. Gentile would have been directed to him. He reviewed the CRA electronic diary and found no record of a returned notice pertaining to the 2001 and 2002 assessments.

[7] CRA relies on a computer system to issue the tax debt certificates that are approved and signed by a designate of the Minister of National Revenue and filed in the Federal Court Registry. In this case, another CRA Officer, Mr. Don Ballanger, was responsible for issuing the certification of the accumulated tax debt on May 15, 2004. He states that a review of the electronic diary and historics records showed an amount owing of $204, 704.21 as of that date. Under cross-examination, Mr. Belanger acknowledged that the certification process does not involve any form of verification that notices of assessment were actually mailed to the applicant.

[8] Mr. Gomes denies having received the underlying assessments of the tax debt for Dupont certified by the Minister in 2004. He says that the practice when Dupont and Applewood shared space was for Applewood's secretary to collect the mail. After Applewood and Dupont severed ties, Mrs. Manuel gave Mr. Gomes a computer, hard drive and documents still in her possession. Mr. Gomes put the box of records in storage to deal with later at the new location. In January, 2005 Dupont experienced a fire at that address. All records were destroyed in the fire.

[9] On April 29, 2005, Mr. Gomes received a Derivative Director's Liability Assessment in which he was assessed as being one of the directors of the applicant Dupont and therefore liable under the statute to pay the unremitted tax debt. In February, 2006, his counsel forwarded a notice of objection to the CRA on behalf of Mr. Gomes. In subsequent correspondence, counsel sought copies of the underlying corporate assessments. Despite repeated requests, they were not produced by the CRA. In a letter dated June 10, 2007 the CRA Access to Information and Privacy Directorate advised applicant's counsel that the Sudbury Tax Centre and the Toronto North Tax

Service Office were unable to locate copies of the assessments. On cross-examination Mr. Gentile advised that he could have reproduced the 2001 and 2002 underlying corporate assessments if requested by someone with authority to do so.

[10] Enforcement of the tax certificate was held in abeyance pending review of the objection. The assessment was confirmed and notice issued to Mr. Gomes in July 2008. Appeals in respect of Mr. Gomes' personal liability filed in the Tax Court of Canada and in the Ontario Superior Court of Justice (in respect of the tax debt owed to the province) are being held in abeyance until this application is determined.

ISSUES:

[11] The several issues raised by the parties can be reduced to two:

1. Was it necessary for the Minister to issue notices of assessment to the taxpayer for unpaid payroll taxes and if so, has it been established that notice was given?
2. If notice of assessment was required and was not given to the taxpayer, should the certificate be declared a nullity?

ARGUMENTS & ANALYSIS:

Standard of Review

[12] In the present matter, the Minister's discretion to certify the debt was exercised by a designate relying upon the historics record maintained in the CRA electronic database. To the extent that questions of natural justice, legitimate expectation and procedural fairness arise in this matter,

the Court must determine whether fairness requires that the decision be overturned: *eBay Canada Limited et al. v. MNR*, 2008 FCA 348 at para. 36. Otherwise, the issues involve questions of mixed fact and law in which the legal question cannot be extricated from the factual findings and deference should be shown: *Canada (Citizenship and Immigration) v. Khosa* 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 89.

[13] This matter is, in my view, analogous to a judicial review of a fairness decision by tax officials as the applicant is, in effect, seeking relief from the negative decision he received in response to his objection to the derivative liability assessment. As stated by Justice James O'Reilly in *Sandler v. Canada (Attorney General)*, 2010 FC 459, 2010 D.T.C. 5073 at para. 7, this Court "can overturn the Minister's decision under the fairness provision only if it was unreasonable, in the sense that it falls outside the range of possible acceptable outcomes based on the facts and the law", citing *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23 at para. 25. See also: *Osborne v. The Attorney General of Canada*, 2010 FC 673. The overall standard of review on this application should therefore be reasonableness.

Assessment and Notice Requirements

[14] The applicant's case essentially rests on the argument that the formal requirements of notice under the ITA and other tax statutes apply to assessments for failure to remit payroll taxes. The applicant does not dispute that a tax liability arose from the corporate activities but argues that the obligation to actually pay the debt does not arise until a notice of assessment is issued and mailed to the taxpayer. The applicant submits that a certificate can only be issued upon default of payment

following these actions. Failing proof of issuance of the assessment and proof of mailing of the notice to the taxpayer, the certificate is invalid and must be quashed.

[15] The applicant alleges that notices of the underlying corporate assessments were never issued, or, if issued, were never mailed to Dupont. While it is not necessary to prove receipt, the burden of proving the existence of the notices and the date of mailing falls on the Minister. This, asserts the applicant, is within the Minister's knowledge and the respondent alone controls the means of adducing evidence of the completion of either act.

[16] In this case, the applicant contends, the Minister's evidence contains significant inconsistencies and falls short of establishing that notices of assessment were in fact created and mailed to the applicant. The respondent has been unable to produce the corporate assessments. Moreover, the evidence pertaining to the respondent's mailing practices at the relevant time was not first hand knowledge but was based on "information and belief", contrary to Rule 81 of the *Federal Courts Rules*, SOR/98-106. It was within the power of the respondent to provide direct evidence of CRA's mailing procedures, especially in light of the importance of mailing procedures in this application. As witnesses with that knowledge did not provide evidence, the applicant could not directly cross-examine the source of the information relied on by the respondent.

[17] The applicant further submits that its right to procedural fairness has been breached by the Minister's certification of the amount payable without first issuing Notices of Assessment. The scheme of the tax legislation provides that a taxpayer may object to a liability imposed after the taxpayer has been assessed: subsection 165(1) of the ITA; Sections 27.1, 92, 22 CPP, EI and ITA (Ontario) respectively. The respondent is required to "give a taxpayer adequate notice of the basis of

reassessment, so that a taxpayer can fairly appeal or respond": *Frederick J. Buccini v. Her Majesty the Queen*, 2000 DTC 6685 (FCA), at para. 16, referring to *Continental Bank of Canada v. R.* [1998] 2 S.C.R. 358.

[18] The applicant argues it is fair and reasonable for it to have the legitimate expectation that before the Minister "certifies" an "amount payable" pursuant to subsection 223(2) of the ITA, the Minister would have first ascertained the amount payable via the normal assessment process and then would have completed that assessment process by issuing (i.e. mailing) a Notice of Assessment to the applicant. This would allow the applicant the opportunity to respond by objecting. In the result, the certificate should be nullified as the Minister has not satisfied the burden of proving that the assessment had been mailed.

[19] The respondent's position is that the CRA is not required to mail notices for failure to remit payroll taxes before certifying a payroll tax debt. The ITA requires all employers to calculate, withhold and remit payroll taxes from employee wages. There is no requirement for the mailing of notices of assessment prior to these amounts becoming due. Employers regularly become liable to pay amounts to the Crown without being assessed by the Minister. If the Minister assesses an employer for failure to remit payroll taxes that have become payable, those outstanding amounts are payable to the Receiver General, even if they are in dispute. If an employer fails to comply with source deduction requirements, any outstanding "amount payable", plus interest, may be certified by the Minister of National Revenue for the purpose of securing the debt or as a precursor to collection: *In the Matter of an Assessment or Assessments by the Minister of National Revenue Under the Income Tax Act, the Canada Pension Plan and the Unemployment Act Against 92000*

Holdings Limited, 93 DTC 5047 at para. 5. Collections restrictions, which otherwise prevent the Minister from certifying a tax debt until a notice of assessment has been mailed, do not apply to payroll taxes, in the respondent's submission: ITA s. 225.1(6)(b); *Canada (Minister of National Revenue) v. Swiftsure Taxi Co*, 2004 FC 980, [2004] 4 C.T.C. 304 at para. 16; *Jus D'Or Inc. v. CCRA*, 2007 FC 754 at paras. 12-15.

[20] Further, the respondent submits, mailing requirements are procedural fairness requirements material to pursuing rights of appeal. They do not restrict the collection of payroll debts. Should there have been a true error on the part of the Minister in failing to mail the assessment, the respondent contends that Dupont's remedy is to request an extension of time for filing a Notice of Objection prior to appealing to the Tax Court of Canada.

[21] I agree with the applicant that where proof of the issuance and mailing of a notice of assessment is required, the onus falls on the Minister. This is because the facts are "peculiarly within his [the Minister's] knowledge and he alone controls the means of adducing evidence of them": *Aztec Industries Inc. v. Her Majesty the Queen*, 95 DTC 5235, [1995] 1 C.T.C. 327 (FCA) at para. 12. Here, the applicant's counsel has effectively pointed out shortcomings in the Minister's evidence concerning the mailing of the underlying assessments such as the lack of direct evidence from a mailroom employee and inconsistencies in the evidence of the Minister's witnesses as to the procedures followed in 2003. But, if it is necessary to find that notices of assessment were mailed, I am satisfied on the basis of the Minister's evidence that the two notices of failures to remit payroll assessments for the 2001 and 2002 tax years were placed into the CRA mail stream and mailed to Dupont in 2003.

[22] As stated by Justice Marshall Rothstein in *Kovacevic v. Canada,* 2003 FCA 293, 308 N.R. 266 at para. 16:

> [w]hen legislation requires that documents be sent by a large organization such as a government department by ordinary mail, but does not require registered or certified mail or evidence of a more formal means of sending … [G]enerally it would be sufficient to set out in an affidavit, from the last individual in authority who dealt with the document before it entered the normal mailing procedures of the office, what those procedures were.

That standard, in my view, was satisfied by Mr. Gentile's evidence.

[23] I note that in *Kovacevic,* the legislation required the use of registered mail and the evidence fell short of proving that was done. However, I do not think it was necessary in this case for the Minister to prove that notices of assessment were mailed to Dupont in order to establish that certification of the tax debt was reasonable. There is no factual dispute in this matter that Dupont, through its controlling directors, was aware of the outstanding tax liability. They had met with Mr. Pizzonia and had received from him the trust report setting out the amounts owing for the unpaid payroll taxes in 2001 and 2002.

[24] Mr. Gomes acknowledged in his evidence that he was aware of the debt and that it was roughly the same amount that Dupont was owed by Applewood. Mr. Gomes also acknowledged not having attended to his tax records between the time Dupont and Applewood separated in 2003 and the fire that occurred in January, 2005, thereby displaying a degree of negligence with respect to his corporate responsibilities, tantamount to wilful blindness. He could not say whether the notices were in his box of records or not as he did not examine the contents of the box. The urgency of the matter

was only brought home to him when he received the Director's Derivative Liability Assessment in 2005 which attributes the corporation's tax debt to him in his personal capacity.

[25] The jurisprudence relied upon by the applicant to advance the claim that the Minister is required to provide the taxpayer with a notice of assessment involve cases pertaining to personal income tax, not payroll taxes. So, although the Minister may be obliged to provide an individual with a notice assessment, the same is not true for the withholding and remitting of payroll taxes. Section 153 of the ITA explicitly instructs those persons who pay out wages to deduct a certain percentage of the salary for taxes and remit that amount to the Receiver General:

153. (1) Every person paying at any time in a taxation year	153. (1) Toute personne qui verse au cours d'une année d'imposition l'un des montants suivants :
(*a*) salary, wages or other remuneration, other than amounts described in subsection 115(2.3) or 212(5.1),	*a*) un traitement, un salaire ou autre rémunération, à l'exception des sommes visées aux paragraphes 115(2.3) ou 212(5.1);
[…]	[…]
shall deduct or withhold from the payment the amount determined in accordance with prescribed rules and shall, at the prescribed time, remit that amount to the Receiver General on account of the payee's tax for the year under this Part or Part XI.3, as the case may be, and, where at that prescribed time the person is a prescribed person, the remittance shall be made	doit en déduire ou en retenir la somme fixée selon les modalités réglementaires et doit, au moment fixé par règlement, remettre cette somme au receveur général au titre de l'impôt du bénéficiaire ou du dépositaire pour l'année en vertu de la présente partie ou de la partie XI.3. Toutefois, lorsque la personne est visée par règlement à ce moment, la somme est versée au compte

to the account of the Receiver General at a designated financial institution.	du receveur général dans une institution financière désignée.

[26] See also s.108 of the *Income Tax Regulations*, C.R.C., c. 945 ("Regulations") which further requires payment of taxes not remitted to the Receiver General within 7 days of ceasing to carry on a business:

108.	108.
[…]	[…]
(2) Where an employer has ceased to carry on business, any amount deducted or withheld under subsection 153(1) of the Act that has not been remitted to the Receiver General shall be paid within 7 days of the day when the employer ceased to carry on business.	(2) Lorsque l'employeur a cessé d'exploiter une entreprise, tout montant déduit ou retenu en vertu du paragraphe 153(1) de la Loi qui n'a pas été remis au Receveur général doit l'être dans les 7 jours de la date à laquelle l'employeur a cessé d'exploiter l'entreprise.

[27] Section 153 of the ITA and s. 108 of the Regulations both apply to the applicant Dupont. In allowing Applewood to transfer only net amounts to Dupont to pay its employees, it failed to adhere to the tax scheme.

[28] Further, the provisions in subsections 225.1(1) and following prohibit the Minister from, among other things, certifying an assessed tax debt or giving notice of such a liability until after the collection-commencement day in respect of the amount. Subsection 225.1(6)(b) makes it clear that these provisions do not apply to amounts <u>required to be deducted or withheld</u>:

225.1 (1) If a taxpayer is liable for the payment of an amount assessed under this Act, other than an amount assessed under subsection 152(4.2), 169(3) or 220(3.1), the Minister shall not, until after the collection-commencement day in respect of the amount, do any of the following for the purpose of collecting the amount:

225.1 (1) Si un contribuable est redevable du montant d'une cotisation établie en vertu des dispositions de la présente loi, exception faite des paragraphes 152(4.2), 169(3) et 220(3.1), le ministre, pour recouvrer le montant impayé, ne peut, avant le lendemain du jour du début du recouvrement du montant, prendre les mesures suivantes :

(*a*) commence legal proceedings in a court,

a) entamer une poursuite devant un tribunal;

(*b*) certify the amount under section 223,

b) attester le montant, conformément à l'article 223;

(*c*) require a person to make a payment under subsection 224(1),

c) obliger une personne à faire un paiement, conformément au paragraphe 224(1);

(*d*) require an institution or a person to make a payment under subsection 224(1.1),

d) obliger une institution ou une personne visée au paragraphe 224(1.1) à faire un paiement, conformément à ce paragraphe;

(*e*) [Repealed, 2006, c. 4, s. 166]

e) [Abrogé, 2006, ch. 4, art. 166]

(*f*) require a person to turn over moneys under subsection 224.3(1), or

f) obliger une personne à remettre des fonds, conformément au paragraphe 224.3(1);

(*g*) give a notice, issue a certificate or make a direction under subsection 225(1).

g) donner un avis, délivrer un certificat ou donner un ordre, conformément au paragraphe 225(1).

[…]	[…]
(6) Subsections 225.1(1) to 225.1(4) do not apply with respect to	(6) Les paragraphes (1) à (4) ne s'appliquent pas :
(*b*) an amount required to be deducted or withheld, and required to be remitted or paid, under this Act or the Regulations;	*b*) aux montants à déduire ou à retenir, et à remettre ou à payer, en application de la présente loi ou de son règlement;

[29] Therefore, as correctly argued by the respondent, it is not necessary to mail notices of assessment prior to these amounts becoming due. This is consistent with the duty of the Minister to promote and protect the public interest by ensuring the ITA is applied fairly: *Canada (Minister of National Revenue) v. Swiftsure Taxi Co.*, 2004 FC 980, [2004] 4 C.T.C. 304 at para. 16; *Jus D'Or Inc. v. CCRA*, 2007 FC 754 at paras. 12-15.

[30] Subsection 227(9.4) of the *Act* places the liability for paying taxes resulting from failure to remit an amount deducted or withheld on the person responsible for failing to do so:

227.	227.
[…]	[…]
(9.4) A person who has failed to remit as and when required by this Act or a regulation an amount deducted or withheld from a payment to another person as required by this Act or a regulation is liable to pay as tax under this Act on behalf of the other person the amount so deducted or withheld.	(9.4) La personne qui ne remet pas, de la manière et dans le délai prévus à la présente loi ou à son règlement, un montant déduit ou retenu d'un paiement fait à une autre personne conformément à la présente loi ou à son règlement doit payer, au nom de cette autre ersonne, à titre d'impôt en vertu de la présente loi, le montant ainsi déduit ou retenu.

[31] Subsection 227(10.1) adds to this, stating that the Minister may at any time assess the amount in question:

(10.1) The Minister may at any time assess	(10.1) Le ministre peut, en tout temps, établir une cotisation :
(*a*) any amount payable under section 116 or subsection 227(9), 227(9.2), 227(9.3) or 227(9.4) by any person, (*a.1*) [Repealed, 1997, c. 25, s. 67(7)]	*a*) pour un montant payable par une personne en vertu de l'article 116 ou des paragraphes (9), (9.2), (9.3) ou (9.4);
(*b*) any amount payable under subsection 227(10.2) by any person as a consequence of a failure by a non-resident person to remit any amount, and	*b*) pour un montant payable par une personne en vertu du paragraphe (10.2) pour défaut par une personne non-résidente d'effectuer un versement;
(*c*) any amount payable under Part XII.5 or XIII by any non-resident person, and, where the Minister sends a notice of assessment to the person, sections 150 to 163, subsections 164(1) and 164(1.4) to 164(7), sections 164.1 to 167 and Division J of Part I apply with such modifications as the circumstances require.	*c*) pour un montant payable par une personne non-résidente en vertu des parties XII.5 ou XIII. Si le ministre envoie un avis de cotisation à la personne, les articles 150 à 163, les paragraphes 164(1) et (1.4) à (7), les articles 164.1 à 167 et la section J de la partie I s'appliquent, avec les adaptations nécessaires.

[32] In other words, the CRA is entitled to verify that payroll taxes have been properly remitted to the Receiver General. Nothing in the present matter suggests that the CRA pursued a course of action that was beyond the ambit of its power as provided by the ITA. The applicant Dupont did fail to withhold employee tax and remit that tax to the Receiver General. The CRA had the statutory authority to follow up on that failure through the certification of the tax debt.

[33] Having found that it was unnecessary for the Minister to issue notices of assessment to the taxpayer Dupont for unpaid payroll taxes, the question of whether the applicant received these assessments becomes moot. In any event, and has already been suggested, the applicant may apply to the Minister to request an extension of time for filing a notice of objection prior to appealing to the Tax Court of Canada: ITA s. 166.1(1); ITA s. 166.2(5) (b) (iii).

[34] Based on the foregoing, I cannot find that it was unreasonable for the Minister to certify the debt in the amount of $204,704.21 plus interest. The ITA does not require the Minister to provide notices of assessments to corporate taxpayers who have an ongoing obligation to remit payroll taxes. Furthermore, it is clear from the evidence that the applicant was either fully aware, or ought to have been aware, of the debt owed and the obligation to pay it. As such, the certificate shall not be declared a nullity and this application for judicial review is dismissed with costs to the respondent.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that:

1. the Certificate filed in the Federal Court Registry under s.223 of the *Income Tax Act* on June 11, 2004 as Court File No. 6552-04 that the amount of $204, 704.21 plus interest from May 15, 2004 was payable by the applicant and had not been paid is valid;
2. the application for judicial review of the decision to certify the applicant's tax debt and the Certificate is dismissed; and
3. the respondent is awarded costs fixed at $2000.00.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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