

Federal Court



Cour fédérale

Date: 20150220

Docket: T-1727-14

Citation: 2015 FC 223

Ottawa, Ontario, February 20, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

JOE FIORUCCI

Applicant

and

**THE MINISTER OF NATIONAL REVENUE
AND THE CANADA REVENUE AGENCY**

Respondent

JUDGMENT AND REASONS

[1] Joe Fiorucci (the Applicant) has brought an application for judicial review of a refusal by the Minister of National Revenue (the Respondent) to adjust his tax return for the 2000 taxation year. The Applicant asks the Respondent to permit a business investment loss of \$144,683 and thereby apply an allowable business investment loss (ABIL) of \$72,341.50 pursuant to subsection 152(4.2) of the *Income Tax Act*, RSC, 1985, c 1 (the Act).

[2] For the reasons that follow, the application for judicial review is dismissed with costs.

I. Facts

[3] The Applicant was self-represented in this proceeding but appeared together with his accountant, Mr. Martin Lapedus. The Applicant filed only a brief affidavit in support of his claim. In paragraph 6 of his affidavit, the Applicant deposed that he “claimed a small business loss on [his] 2000 personal income tax return in the amount of \$72,341 which was disallowed.”

[4] The Respondent filed the affidavit of Nicole Giroux, an officer with the Sudbury Office of the Canada Revenue Agency (CRA). Ms. Giroux’s affidavit and its exhibits demonstrate the following:

- (a) On November 14, 2002, Mr. Martin Lapedus, the Applicant’s accountant, submitted a written request to the CRA for the ABIL.
- (b) On May 14, 2003, the CRA acknowledged receipt of the requested ABIL and asked for further information to be submitted within 30 days.
- (c) On June 19, 2003, the CRA wrote to Mr. Lapedus to inform him that they had not received the supporting documentation and gave the Applicant a further 30 days to provide it, failing which no action would be taken with regard to the requested ABIL.
- (d) Having received no reply within 30 days, the CRA denied the requested ABIL and closed the file.

- (e) On August 8, 2007, Mr. Lapedus wrote to the CRA to advise that the Applicant was unable to locate a copy of the financial statements of his corporation JOFCO Construction Inc. (JOFCO) for the 2000 taxation year to support his claim for the ABIL. He asked the CRA to provide a copy of the 2000 T2 return and financial statements to the Applicant.
- (f) On October 2, 2007, the CRA telephoned Mr. Lapedus and told him that JOFCO's 2000 T2 return had not been filed. Mr. Lapedus requested a copy of the 1999 T2 return instead.
- (g) On October 15, 2007, the CRA forwarded a copy of JOFCO's 1999 T2 return and financial statements to JOFCO, to the attention of the Applicant.
- (h) On June 21, 2011, the Applicant made a request under subsection 152(4.2) of the Act (the taxpayer relief provisions) for the ABIL.
- (i) On August 15, 2011, the CRA wrote to the Applicant to inform him that his request for an adjustment to his 2000 return under the taxpayer relief provisions could not be considered because it was received after the ten-year limitation period.
- (j) On October 3, 2011, the Applicant made another request for the ABIL. Following further correspondence between Mr. Lapedus and the CRA,

the CRA agreed to review the request under the taxpayer relief provisions (the First Level Request).

- (k) On May 2, 2013, the CRA wrote to the Applicant and stated the following:

Normally, a request to adjust a return must be made within three years from the mailing date of the respective "Notice of Assessment". However, subsection 152(4.2) of the *Income Tax Act* allows certain adjustments to returns that are otherwise normally barred by statute, provided that all relevant documents to support the claim are provided at the time of the request.

[. . .]

In order for us to consider your request for adjustment, we require additional information. Please complete the enclosed questionnaire and return it to our office along with the supporting documentation.

- (l) On May 22, 2013, Mr. Lapedus telephoned the CRA to request a 30 day extension, which was granted until July 2, 2013.
- (m) On May 27, 2013, Mr. Lapedus wrote to the CRA to acknowledge receipt of the questionnaire, and stated that much of the information requested by the CRA was not available due to a flood. He conceded that it would be difficult to substantiate the Applicant's claim.
- (n) On June 6, 2013, the CRA completed its review and proposed to deny the ABIL because the Applicant had not provided: (i) a copy of the shareholder loan account from the general ledger of the corporation and

details of all transactions in the account; (ii) documentation confirming that the funds were transferred to the corporation (either the original cancelled cheques, certified true copies of both the front and back of all cheques, or other documentary evidence showing the transfer of the funds into the corporation's account); and (iii) documentation to support the corporation's inability to repay the loans due bankruptcy, insolvency or winding-up.

- (o) On November 21, 2013, the CRA advised the Applicant of its decision to deny the First Level Request, stating that it could not permit the ABIL without supporting documentation in accordance with section 39 and subsection 152(4.2) of the Act (the First Level Decision).
- (p) On December 11, 2013, the Applicant applied to the Director of Tax Services of the CRA for a review of the First Level Decision.
- (q) On March 24, 2014, the CRA wrote to the Applicant to acknowledge receipt of the request. In this letter, the CRA repeated its demand from the First Level Review for supporting documentation.
- (r) On April 4, 2014, Mr. Lapedus provided the CRA with a partially completed questionnaire. He also informed the CRA that he had previously submitted all of the documentation that was available. Mr. Lapedus took the position, on behalf of the Applicant, that the CRA had

only three years from the date of assessment to request information regarding JOFCO, and if the information had been requested in 2002 to 2004, then it would have been available.

(s) On April 28, 2014, the CRA completed the review and proposed to deny the ABIL because the Applicant had once again not provided the necessary supporting documentation.

(t) On July 11, 2014, the CRA denied the second level request, referencing its letter dated July 10, 2014.

[5] In oral submissions before this Court the Applicant alleged, apparently for the first time, that neither he nor Mr. Lapedus had any notification from the CRA regarding his 2000 income tax return until he received a telephone call from a tax collector in 2007. He denied receiving a notice of assessment with respect to any of his income tax returns, and specifically denied that he or Mr. Lapedus had received correspondence from the CRA dated May 14, 2003 or June 19, 2003 (Exhibits A and B to the Affidavit of Nicole Giroux). In its letter dated May 14, 2003 addressed to Mr. Lapedus, the CRA wrote as follows:

We have received a request from you dated November 14, 2002 to adjust your client's return to include an allowable business investment loss in 2000.

[...]

In order for us to complete the request for adjustment, we require additional information. Please complete the enclosed questionnaire and return it to our office along with the supporting documentation.

[6] The Applicant acknowledged to the Court that the requested supporting documentation was available until approximately 2008.

II. Analysis

[7] The standard of review for a decision of the Minister under subsection 152(4.2) of the Act is reasonableness (*Lanno v Canada (Customs and Revenue Agency)*, 2005 FCA 153, [2005] FCJ No 714; *Panchyshyn v Canada (Canada Revenue Agency)*, 2008 FC 996, [2008] FCJ No 1241).

[8] Subsection 152(4.2) of the Act permits certain adjustments to be made to income tax returns that are otherwise barred by statute.

(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

(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 (sauf une fiducie) ou succession assujettie à l'imposition à taux progressifs — 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

year; and

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), 122.8(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.

[9] The Applicant has not identified any error on the part of the Respondent in considering his request for an ABIL. The sole ground advanced by the Applicant before the Court was that neither he nor Mr. Lapedus was informed until 2007 that supporting documentation would be required in order for the CRA to consider his claim. The Applicant did not offer sworn testimony from either Mr. Lapedus or himself to substantiate this allegation, which was raised for the first time in oral submissions. The Applicant was aware of the contents of the Affidavit of Nicole Giroux well in advance of the hearing, but he chose neither to cross-examine Ms. Giroux nor offer alternative sworn evidence in rebuttal. I reject the Applicant's assertion that he and Mr. Lapedus did not receive the CRA's demands for supporting documentation in 2003.

[10] Furthermore, I note that the letter from the CRA dated May 14, 2003 referred specifically to a request from Mr. Lapedus dated November 14, 2002 to adjust the Applicant's return to

include an ABIL in 2000. In addition, in his own affidavit the Applicant deposed that he had claimed a small business loss on his 2000 personal income tax return in the amount of \$72,341, but that this was disallowed by the CRA. It is simply not credible for the Applicant to maintain that he was unaware of the CRA's assessment of his 2000 tax return or the need for documentation to support the ABIL until 2007. His claim that the supporting documentation could not be obtained due to the passage of time is similarly unworthy of belief.

[11] The Applicant's suggestion that a three-year limitation period applies to the CRA's power to demand supporting documentation for the purpose of reassessment under subsection 152(4.2) of the Act leads to an absurdity. Under subsection 152(4.2) of the Act, a ten-year limitation period is prescribed for the Minister to exercise discretion in deciding whether to reassess a taxation year when the normal three-year limitation period has expired. If the Applicant's position were correct, then any reassessment under subsection 152(4.2) of the Act would have to be conducted without a requirement of supporting documentation. In any event, I am satisfied that the Applicant and Mr. Lapedus were both aware of the need to provide documentation in support of the requested ABIL by May, 2003 at the very latest. By the Applicant's and Mr. Lapedus' own admission, the documentation was available at that time.

[12] The Applicant has failed to identify any error or procedural defect in the Respondent's consideration of the requested ABIL, and accordingly the application for judicial review is dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed
with costs

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1727-14

STYLE OF CAUSE: JOE FIORUCCI
v
THE MINISTER OF NATIONAL REVENUE AND THE
CANADA REVENUE AGENCY

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 22, 2015

**REASONS FOR JUDGMENT
AND JUDGMENT:** FOTHERGILL J.

DATED: FEBRUARY 20, 2015

APPEARANCES:

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(ON HIS OWN BEHALF)

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