

Federal Court



Cour fédérale

Date: 20191125

Docket: T-1594-18

Citation: 2019 FC 1496

Ottawa, Ontario, November 25, 2019

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

WESTMINSTER SAVINGS CREDIT UNION

Applicant

and

**THE ATTORNEY GENERAL OF CANADA,
REPRESENTING THE MINISTER OF
NATIONAL REVENUE**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a determination by the Canada Revenue Agency [CRA] that the Applicant, Westminster Savings Credit Union [WSCU], does not meet the definition of “credit union” found in subsection 123(1) of the *Excise Tax Act*, RSC 1985, c E-15 [the ETA] and subsection 137(6) of the *Income Tax Act*, RSC 1985, c1 (5th Supp) [the ITA].

[2] At the heart of the dispute is whether WSCU derives “all or substantially all” of its revenues from a list of sources defined in the ITA. In the course of auditing WSCU’s affairs, the CRA determined that it does not.

[3] The key issue on this application for judicial review, however, does not involve statutory interpretation of the ITA, but rather whether this Court is the proper forum for WSCU to seek its desired remedy.

II. Background

[4] WSCU was incorporated in British Columbia on October 19, 1944, and is governed by the *BC Credit Union Incorporation Act* and the *Financial Institutions Act*.

[5] WSCU’s primary business is to act as a credit union. In this capacity, it collects deposits from its members, pays interest to its members on said deposits, and invests the deposits to earn a return. WSCU also loans money to its members, and the interest charged on these loans is WSCU’s primary source of revenue.

[6] In addition to earning revenue through interest on loans to its members, WSCU earns revenue from the following sources:

- WSCU earns fees from members and non-members for acting as the trustee of various trusts
- WSCU owns, manages, and earns income from an investment portfolio of assets

- WSCU receives various fees from Credential Asset Management Inc in exchange for Credential providing its wealth-management services to WSCU's members
- WSCU earns management fees from Mercado Capital Corp and Mercado Financing Ltd, equipment lease financing corporations owned by WSCU
- WSCU earns revenue through WS Leasing Ltd, a wholly owned BC corporation that purchases various automobiles and equipment from third party dealers and leases those properties to members of the public
- WSCU receives various fees from Desjardins Financial Group when Desjardins issues credit cards to WSCU's members pursuant to an agreement between Desjardins and WSCU

A. *The GST Audit*

[7] In 2015, the CRA informed WSCU that it was starting an audit under the ETA for WSCU's 2013 and 2014 reporting periods [the GST Audit]. The CRA later expanded the GST Audit to include WSCU's 2015 and 2016 reporting periods.

[8] In the course of the GST Audit, the CRA informed WSCU that it had submitted a request to the CRA Excise and GST/HST Rulings Directorate for a ruling on whether WSCU was a "credit union" as defined in subsection 123(1) of the ETA and subsection 137(6) of the ITA.

[9] The Excise and GST/HST Rulings Directorate referred this request to the CRA Income Tax Rulings Directorate on the basis that the requested ruling was actually an income tax issue. The ETA definition of "credit union" refers to the definition of that term in the ITA.

[10] The Income Tax Rulings Directorate issued its ruling on April 7, 2017. After providing a detailed analysis of WSCU's financial arrangements in relation to the definition of "credit union," the ruling concludes by stating, "it is possible that [WSCU] does not meet the definition of a credit union in subsection 137(6)."

[11] On September 22, 2017, a GST/HST Auditor at the CRA sent WSCU a memo and working papers setting out his analysis of WSCU's revenue, and the position that "we do not believe that WSCU meets the definition of a credit union under subsection 137(6) of the *Income Tax Act*." The letter acknowledged that this finding had potential consequences under the ITA. However, the review conducted by the GST Auditor was limited to WSCU's GST/HST returns.

[12] On February 22, 2018, the CRA sent WSCU the spreadsheets it had used to calculate WSCU's revenues from members and from other sources for the 2013 to 2016 reporting periods.

[13] On August 2, 2018, a GST/HST Auditor at the CRA spoke with WSCU's representative, Susan Lovell, regarding various issues including whether WSCU met the definition of "credit union." At the conclusion of this conversation, Ms. Lovell asked the GST/HST Auditor to put his comments into writing, prompting the letter at issue in this application.

III. Decision Under Review

[14] In a letter dated August 9, 2018 [the August 9 Letter] the CRA informed WSCU that it had determined that WSCU does not meet the definition of "credit union" found in subsection 123(1) of the ETA and subsection 137(6) of the ITA. The determination was based on the

information obtained by CRA and the ruling requested from the Income Tax Rulings Directorate. Despite this determination, the August 9 Letter stated that the CRA did not foresee any reassessments resulting from the determination.

IV. Post-Decision Events

A. *Application for Judicial Review*

[15] On August 14, 2018, counsel for WSCU informed the CRA that he might make further submissions regarding the determination that WSCU does not meet the definition of “credit union.” However, counsel made no further submissions, and WSCU applied for judicial review of this “determination” on August 29, 2018.

[16] The Attorney General brought a motion to strike the application. The hearing was held on January 22, 2019, and WSCU successfully resisted the motion. Justice Roy concluded that absent a tax assessment appealable to the TCC, he was not persuaded that the matter was bereft of any possibility of success (*Westminster Savings Credit Union v Canada (Attorney General)*, 2019 FC 304 at para 32 [*Westminster Savings Credit Union*]). In his view, a full record was required to address the issues in the application (*Westminster Savings Credit Union*, above at para 39).

[17] On May 10, 2019, the CRA completed the GST Audit for the 2013 to 2016 reporting periods and sent a letter to WSCU detailing proposed adjustments. Ultimately, the CRA did *not* propose any adjustments based on the determination that WSCU does not meet the definition of

“credit union” for the purposes of the ETA. To date, CRA has not assessed WSCU under the ETA with respect to the determination that WSCU does not meet the definition of “credit union.”

B. *The Income Tax Audit*

[18] On December 10, 2018, the CRA began a restricted audit of WSCU’s income tax returns for the 2015 and 2016 taxation years [the ITA Audit]. The ITA Audit was restricted to considering whether WSCU met the definition of “credit union” in the ITA.

[19] The CRA used the same spreadsheets showing its calculations of WSCU’s revenues for the 2015 and 2016 taxation years as it had used for the GST Audit.

[20] On March 1, 2019, the CRA wrote to WSCU to advise that it had completed the ITA Audit and proposed to disallow certain deductions claimed under the ITA and reassess WSCU. The CRA finalized the proposed reassessment on June 27, 2019. By notice dated July 16, 2019, the Minister reassessed WSCU’s 2015 and 2016 taxation years, increasing its tax payable on the basis that WSCU did not meet the statutory definition of a “credit union” during those years.

V. Issues

[21] The issues are:

- (1) Does the Court have jurisdiction to consider the application?
- (2) If yes, was the CRA’s determination that WSCU was not a “credit union” as defined in subsection 123(1) of the ETA and subsection 137(6) of the ITA for its 2013 and 2014 reporting periods reasonable?

VI. Relevant Provisions

A. *Federal Courts Act*

[22] Subject to certain exceptions, the Federal Court has exclusive original jurisdiction to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus*, or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission, or other tribunal (*Federal Courts Act*, RSC 1985, c F-7, paragraph 18(1)(a)). The Court further has exclusive original jurisdiction to hear and determine applications or other proceedings for such relief (*Federal Courts Act*, paragraph 18(1)(b)).

[23] The CRA is a “federal board, commission or other tribunal” (*Federal Courts Act*, subsection 2(1)).

[24] The remedies provided in subsection 18(1) may only be obtained on an application for judicial review made pursuant to section 18.1 (*Federal Courts Act*, subsection 18(3)).

[25] The powers of the Federal Court on an application for judicial review are delineated in subsection 18.1(3) of the *Federal Courts Act*:

- (3) On an application for judicial review, the Federal Court may
 - (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
 - (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or

restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

[26] These powers are limited by section 18.5 of the *Federal Courts Act*. Relevant to this matter, where an Act of Parliament provides for an appeal of a decision to the Tax Court of Canada [TCC], that decision is not, to the extent it may be so appealed, subject to review except in accordance with that Act.

[27] Section 12 of the *Tax Court of Canada Act*, RSC 1985, c T-2, provides that the TCC has exclusive original jurisdiction to hear and determine references and appeals to the TCC on matters arising under the ITA and Part IX of the ETA.

B. *Excise Tax Act and Income Tax Act*

[28] “Credit union” is defined in subsection 123(1) of the ETA as follows:

credit union has the meaning assigned by subsection 137(6) of the Income Tax Act and includes a corporation described in paragraph (a) of the definition deposit insurance corporation in subsection 137.1(5) of that Act

[29] “Credit union” is further defined in subsection 137(6) of the ITA. The parties agree that the only relevant portion of the definition in this matter is paragraph (a):

credit union means a corporation, association or federation incorporated or organized as a credit union or cooperative credit society if

(a) it derived all or substantially all of its revenues from

(i) loans made to, or cashing cheques for, members,

(ii) debt obligations or securities of, or guaranteed by, the Government of Canada or a province, a Canadian municipality, or an agency thereof, or debt obligations or securities of a municipal or public body performing a function of government in Canada or an agency thereof,

(iii) debt obligations of or deposits with, or guaranteed by, a corporation, commission or association not less than 90% of the shares or capital of which was owned by the Government of Canada or a province or by a municipality in Canada,

(iv) debt obligations of or deposits with, or guaranteed by, a bank, or debt obligations of or deposits with a corporation licensed or otherwise authorized under a law of Canada or a province to carry on in Canada the business of offering to the public its services as trustee,

(v) charges, fees and dues levied against members or members of members,

(vi) loans made to or deposits with a credit union or cooperative credit society of which it is a member, or

(vii) a prescribed revenue source

VII. Analysis

A. *Does the Court have jurisdiction to consider the application?*

[30] WSCU acknowledges that as a rule, this Court is reluctant to hear an application for judicial review in respect of a decision that is not final (*Entreprise Publique Économique Air Algérie, Montréal, Québec v Hamamouche*, 2019 FC 272 at para 63). However, in WSCU's view CRA's determination in the August 9 Letter represented its conclusion on WSCU's status as a credit union as of that date. Nothing since the letter has caused the CRA to change its mind.

[31] WSCU argues that section 18.5 of the *Federal Courts Rules* does not apply in this case. Because the TCC only has jurisdiction to hear an appeal of an “assessment,” and the CRA’s determination that WSCU is not a “credit union” does not qualify as an “assessment,” WSCU asserts that the determination cannot be appealed to the TCC and therefore this Court is not precluded from judicially reviewing the CRA’s decision.

[32] Further, the August 9 Letter states that the CRA *will not* assess WCU for GST as a result of not meeting the definition of “credit union” during the 2013 to 2016 reporting periods. In WSCU’s submission, absent a future assessment by CRA, no appeal of the determination to the TCC will ever materialize.

[33] WSCU acknowledges that the CRA has issued ITA Reassessments for the 2015 and 2016 taxation years and that WSCU may appeal these Reassessments to the TCC. However, WSCU argues that the present application is limited to whether WSCU meets the definition of “credit union” for the purposes of GST under the ETA for the 2013 and 2014 reporting periods. Because WSCU will not be able to appeal to the TCC in respect of this limited subject matter, section 18.5 of the *Federal Courts Rules* does not prevent review by this Court.

[34] One of the leading decisions on judicial review in the area of tax is *Canada v Addison & Leyen Ltd*, 2007 SCC 33 [*Addison & Leyen*]. In that case, the Supreme Court of Canada cautioned reviewing courts against allowing judicial review to be used “to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court” (*Addison & Leyen*, above at para 11).

[35] Section 18.5 of the *Federal Courts Act* is to be interpreted to preclude parallel proceedings in this Court and the TCC “in respect of substantially the same underlying issue” (*Walker v Canada*, 2005 FCA 393 at para 13 [*Walker*]).

[36] The absence of a reassessment does not guarantee a right to judicial review. Judicial review is a remedy of last resort (*Addison & Leyer Ltd* at para 11). This Court cannot consider an application for judicial review where adequate, effective recourse is available elsewhere or at another time, including in future years (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 84, 91 [*JP Morgan*]).

[37] When scrutinizing the notice of application, the Court must seek to ascertain the “essential character” of the application by reading it holistically (*JP Morgan*, above at para 50). The Attorney General submits, and I agree, that “the essential character of the application is to determine the applicant’s liability for tax.” As admitted by WSCU’s representative Ms. Lovell, WSCU was concerned that it could have to pay GST and possibly income tax in subsequent years as a result of the CRA’s determination that it was not a “credit union.”

[38] In this case, judicial review is not warranted as a remedy of last resort. Regardless of how WSCU frames its application, the underlying issue is the CRA’s interpretation and application of the definition of “credit union” found in the ITA. Posing this issue as one related to the ETA rather than the ITA is not determinative – the definition of “credit union” in subsection 123(1) of the ETA wholly incorporates the ITA definition of the same term.

[39] WSCU currently has an available avenue of appeal to the TCC with respect to the 2015 and 2016 income tax reassessments. While these reassessments are indeed based on the results of the ITA Audit, rather than the GST Audit, the underlying issue is the same: does WSCU satisfy the definition of “credit union” found in paragraph 137(6)(a) of the ITA? That determination would provide the necessary criteria for WSCU to ascertain the appropriate approach to the “all or substantially all” test under subsection 137(6) of the ITA, the proper interpretation of “revenues” and whether such revenues are “derived” from members.

[40] On the motion to strike this application, Justice Roy was satisfied that had there been an assessment of WSCU, this would have constituted the “knockout punch” necessary to strike the application (*Westminster Credit Savings Union* at para 32).

[41] WSCU submits that nothing has changed “on the GST side” since Justice Roy rendered his decision. I disagree. The issues “on the GST side” clearly arise from the definition of “credit union” found in the ETA, which, as previously discussed, is based in the ITA definition of that term. WSCU’s argument amounts to an attempt to sustain this application despite the available avenue of recourse to the TCC.

[42] Moreover, even without the 2015 and 2016 income tax reassessments, WSCU could avail itself of an appeal to the TCC for GST purposes in subsequent years by applying for rebates of GST paid. If the Minister denies the applications, an assessment would issue from which WSCU could appeal. This Court will not entertain an application for judicial review when other adequate, effective recourse is available in the future (*JP Morgan* at para 84). Alternative relief

is available before the TCC, and this Court should not exercise jurisdiction over this matter, even if such jurisdiction were to exist.

[43] Reviewing the reasonableness of the CRA's determination of this issue would run counter to the Federal Court of Appeal's clear direction to avoid parallel proceedings in this Court and the TCC in respect of substantially the same underlying issue (*Walker*, above at para 13). This Court should not permit WSCU's attempt to make an end run around the TCC's exclusive jurisdiction.

[44] Moreover, I agree with the Respondent that the letter requested by WSCU from the CRA to document the decision that WSCU is not a credit union for purposes of subsection 123(1) of the ETA for its 2013 and 2014 reporting periods is more akin to an advance tax ruling than a final decision. The August 9 Letter is not binding on the CRA and therefore the decision is not susceptible to judicial review (*Rothmans, Benson & Hedges Inc v Canada (Minister of National Revenue)*, 1998 CanLII 7237 at paras 27-28 (FC); *Prudential Steel Ltd v Bell Supply Company*, 2016 FCA 282 at para 25).

B. *If yes, was the CRA's determination that WSCU was not a "credit union" as defined by subsection 123(1) of the ETA for its 2013 and 2014 reporting periods reasonable?*

[45] Given my decision on jurisdiction and alternative relief being available before the TCC, I need not consider whether the CRA's determination that WSCU is not a credit union, as defined by subsection 123(1) of the ETA and subsection 137(6) of the ITA, was reasonable.

JUDGMENT in T-1594-18

THIS COURT'S JUDGMENT is that

1. The application is dismissed.
2. Costs to the Respondent to be assessed in accordance with Column III of Tariff B.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1594-18

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