Federal Court Cour fédérale

Date: 20240315

Docket: T-2407-23

Citation: 2024 FC 431

Toronto, Ontario, March 15, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ADAM RAFFAELE MATTINA

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Adam Raffaele Mattina, seeks an interim stay of the referral ("Referral") of his notices of objection ("Objections") to the Audit Division of the Canada Revenue Agency ("CRA") by the Appeals Division of the CRA for the reassessments of his 2013, 2014, and 2017 taxation years (the "Reassessments").

[2] The Applicant requests that the Court stay the Referral of his Objections to the Audit Division for his Reassessments until the determination of the underlying application for judicial review or until the determination of a stay motion.

[3] For the reasons that follow, this interim stay motion is dismissed.

II. **Facts and Underlying Decisions**

[4] According to the Applicant, in June 2018 he was audited for his taxation years in 2014, 2015, and 2016. He alleges that in October 2018, he was audited for his 2013 tax year; in July 2021, the Respondent issued notices of reassessment for the 2013, 2014, and 2017 tax years; and that in November 2021, the Respondent issued a further notice of reassessment for the 2013 tax year.

[5] The Applicant maintains that in October and December 2021, respectively, he filed the Objections to the Reassessments pursuant to section 165 of the *Income Tax Act*, RSC 1985, c 1 (5th supp.) ("*ITA*").

[6] The Applicant further maintains that in November 2022, the Objections were assigned to an Appeals Officer at the CRA, whereby the Appeals Officer provided the Applicant with preliminary views about the Objections in January and February 2023. The Applicant alleges that in September 2023, he had a meeting with an appeals officer and CRA appeals management to discuss his file. He states that the meeting ended on a "positive note," being informed that "a revised recommendation letter would be forthcoming."

[7] The Applicant alleges that in October 2023, he was advised that the Appeals Division had referred the Objections to the Audit Division of the CRA, "due to the substantial amount of information received at the objections stage…[and] to the substantial amount of 'new' information provided at the objection stage, the fact that the Appeals Division of the CRA does not perform audit work, and that the Referral was 'mandatory'." The Applicant states that the Referral was made "instead of issuing a revised recommendation letter and proceeding to vacate, confirm, or vary the Reassessments." The Applicant maintains that between October 2023 and the time of his application for leave and judicial review, he has expressed concerns as to the Referral. In this application, the Applicant notes that the Reassessments do not appear to have been vacated, confirmed, or varied.

[8] It is the Referral that the Applicant requests the Court stay pending the application for judicial review.

III. **Analysis**

[9] The tripartite test for granting a stay is well established: *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) ("*Toth*"); *Manitoba (A.G.) v Metropolitan Stores Ltd*., 1987 CanLII 79 (SCC), [1987] 1 SCR 110 ("*Metropolitan Stores Ltd*"*); RJR-MacDonald Inc. v Canada (Attorney General),* 1994 CanLII 117 (SCC), [1994] 1 SCR 311 ("*RJR-MacDonald*"); *R v Canadian Broadcasting Corp*, 2018 SCC 5 (CanLII), [2018] 1 SCR 196.

[10] The *Toth* test is conjunctive, in that granting a stay requires the applicant to establish: (i) a serious issue raised by the underlying application for judicial review; (ii) irreparable harm; and (iii) the balance of convenience favouring granting the stay.

A. *Serious Issue*

[11] In *RJR-MacDonald*, the Supreme Court of Canada established that the first stage of the test should be determined on an "extremely limited review of the case on the merits" (*RJR-MacDonald* at 314).

[12] On this first prong of the tri-partite test, the Applicant submits that the Minister has not acted according to their authority under section 165(3) of the *ITA*, made the Referral in a manner that was procedurally unfair and without *vires*, and that the Referral is an improper exercise of the Minister's audit powers.

[13] The Respondent submits that there is no serious issue to be tried, the Applicant being precluded from judicial review of his matter at the Federal Court insofar as his matter may be appealed to the Tax Court, and insofar as the Applicant has not exhausted available administrative remedies. The Respondent further submits that the Court cannot grant the relief sought; namely, that the Court cannot compel the Minister to vacate, vary, or confirm the Reassessment.

[14] Having reviewed the materials, I agree with the Respondent. The Applicant's remedy regarding the Minister's actions under section 165(3) of the *ITA* is with the Tax Court, pursuant

to paragraph 169(1)(b) of the *ITA*. I find that this accords with the statutory requirements under section 18.5 of the *Federal Courts Act*, RSC 1985, c F-7, given the *ITA* expressly provides for an appeal to the Tax Court. I further note that the Federal Court of Appeal has confirmed that "the Minister's failure to act 'with all due dispatch' is not a basis for overturning an assessment" (*Rafique v Canada (National Revenue)*, 2024 FCA 37 ("*Rafique*") at para 7, citing *Ford v. Canada*, 2014 FCA 257 at para 19, (in turn citing *Bolton v R.*, 1996 CanLII 21607 (FCA), [1996] 3 CTC 3, 200 NR 303)).

[15] Additionally, the question of *vires* under section 165(3) of the *ITA*—whether the Minister could delegate the Minister's duties under section 165(3) by the Referral of the Applicant's Objections of the Reassessments to the Audit Division—is a question of whether administrative action finds its source in legislation (*JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 ("*JP Morgan*") at para 70). I am mindful of this Court finding, in certain circumstances, that the Minister's decision to undertake an audit can be subject to judicial review (*Rosenberg v Canada (National Revenue)*, 2015 FC 549 at para 56). The Applicant himself points to section 220(2.01) of the *ITA*, which states that "[t]he Minister may authorize an officer or a class of officers to exercise powers or perform duties of the Minister under this Act."

[16] There is, of course, a question of what exactly this delegation entails. But the Applicant misleads in characterizing the issue as and whether the Referral of the Applicant's Objections to the Reassessments to the Audit Division is one such authorized delegation. While not making a determination as to the legal question of the Appeals Division's authority under the *ITA*, the

evidence provided by the Applicant himself shows that the Appeals Division appears to be empowered to render a decision under section 165(3) of the *ITA*, and there is no mention of the Audit Division. The evidence tendered for this motion suggests that the Audit Division is merely supposed to make a recommendation to the Appeals Division, whereupon the Appeals Division makes a decision. There is thus no serious issue, for the purposes of this motion and based on the submissions advanced by the Applicant, raised with the *vires* argument.

[17] I further do not accept the Applicant's submission that the Minister allegedly failing to exercise their auditing powers "judiciously and in good faith" with respect to delaying the application raises a serious issue. The Applicant has not led any evidence that the Minister has exercised their discretion non-judiciously or in bad faith in this matter, aside from noting that the process has taken nearly three years. Moreover, from the standpoint of the law and as stated above, the Minister allegedly failing to act "with all due dispatch" under the *ITA* is not a basis for overturning an assessment (*Rafique* at para 7). Questions of "inexcusable delay" by the Minister may be redressed by other forums than this Court, and procedural defects committed by the Minister are nonetheless not themselves a ground for setting aside an assessment (*JP Morgan* at paras 82, 89).

B. *Irreparable Harm*

[18] At the second stage of the test, applicants are required to demonstrate that irreparable harm will result if relief is not granted. Irreparable harm does not refer to the magnitude of the harm; rather, it is a harm that cannot be cured or quantified in monetary terms (*RJR-MacDonald* at 341). This Court must be satisfied on a balance of probabilities that the harm is not

speculative, but does not have to be satisfied that the harm will occur (*Xu v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 746, 79 FTR 107 (FCTD); *Horii v Canada (C.A.)*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[19] The Applicant submits that the Referral of his Objections to the Reassessments to the Audit Division will constitute irreparable harm, it being irreversible, vitiating the Applicant's procedural guarantees for objections, potentially leading to costly litigation at Tax Court, and causing the Applicant "delay, stress, worry, and anxiety." Additionally, the Applicant submits that failing to grant a stay will strip this Court of its jurisdiction to consider the Referral and the Objections.

[20] The Respondent submits that the Applicant has failed to establish irreparable harm, the outcome of the audit not being irreparable and the other allegations of irreparable harm being speculative.

[21] I agree with the Respondent. The Applicant has not led clear and non-speculative evidence that the Referral of the Objections to the Reassessments amounts to irreparable harm (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 ("*Glooscap*") at para 31). There is no indication, for example, that the Appeals Division will accept the Audit Division's findings. Based on the Applicant's own evidence, the Appeals Division's mandate states that the Audit Division simply makes a recommendation to the Appeals Division:

> During the course of resolving an objection, an objector/authorized representative may provide additional documents not provided/produced at the audit stage. If this new/additional information is substantial, the appeals officer may consider

> referring the information back to the Audit Division in order for them to perform audit work and provide a recommendation to the appeals officer.

[22] This is buttressed, in this document, by the Appeals Division having "complete decisional independence relative to the recommendation to confirm, vary or vacate the assessment, or make a reassessment" [emphasis added]. While again not making a determination as to the legal question of the Appeals Division's authority under the *ITA*, the evidence provided by the Applicant for the purposes of this motion suggests that any harm from having the Objections referred to the Audit Division is, in fact, reparable: The Appeals Division will make the final decision independently.

[23] I further agree with the Respondent that the Applicant has not put forward, in this motion, evidence that of what the actual harm would be from the outcome of the Referral, aside from vague claims regarding procedural unfairness and undue delegation of authority. The Applicant has failed to establish that he will be unable to challenge the result of the Referral. The Applicant only speculates as to the harm he would face upon the referral to the Audit Division, which is based upon a belief that there will likely be a negative outcome at the Audit Division and Appeals Division. Moreover, he speculates when claiming that having to appeal the Reassessment at the Tax Court would cause him irreparable harm. Both of these alleged forms of harm are speculative and unclear (*Glooscap* at para 31).

C. *Balance of Convenience*

[24] The third stage of the test requires an assessment of the balance of convenience—a determination to identify which party will suffer the greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits (*RJR-MacDonald* at 342; *Metropolitan Stores Ltd* at 129). It has sometimes been said, "Where the Court is satisfied that a serious issue and irreparable harm have been established, the balance of convenience will flow with the Applicant" (*Mauricette v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 420 (CanLII) at para 48).

[25] The Applicant submits that the balance of convenience is in his favour, staying the Referral until disposition of the underlying application leading to little or no harm to the Respondent, while leading to greater harm to the Applicant if the "irreversible" Referral takes place.

[26] The Respondent submits that precluding the Minister from carrying out statutory responsibilities is injurious to the public interest, the balance of convenience thus lying in their favour.

[27] Having found that the Applicant has not established a serious issue to be tried or irreparable harm is dispositive of this matter. However, the balance of convenience is with the Respondent, as the public interest in having the CRA enforce their statutory mandate outweighs

the speculative forms of harm put forth by the Applicant in this motion (see for example *Fortius Foundations v Canada (National Revenue)*, 2022 FCA 176 at para 39)

[28] Ultimately, the Applicant has not met the tri-partite test required for a stay. This motion is dismissed. There is no award of costs.

ORDER in T-2407-23

THIS COURT ORDERS that the Applicant's motion for an interim stay is dismissed without costs.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2407-23
STYLE OF CAUSE:	ADAM RAFFAELE MATTINA v THE MINISTER OF NATIONAL REVENUE

MOTION FOR A STAY OF EXECUTION AND ENFORCEMENT OF REFERRAL

ORDER AND REASONS:	AHMED J.
DATED:	MARCH 15, 2024

WRITTEN SUBMISSIONS BY:

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