Federal Court  Cour fédérale

Date: 20130423

Docket: T-407-12

Citation: 2013 FC 411

Ottawa, Ontario, April 23, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

JOHN RITTER

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by John Ritter (the Applicant) of a decision by the Canada Revenue Agency (CRA, the Respondent), dated January 24, 2012, to issue a Requirement to Pay (RTP) to the Canada Imperial Bank of Commerce (CIBC) in an effort to collect the Applicant's tax debt. The Applicant is seeking an order quashing or setting aside the RTP, an order declaring the underlying reassessment invalid and unenforceable, and, alternatively, a writ of prohibition prohibiting the Respondent from issuing further RTPs in relation to the challenged reassessment.

Facts

[2] In 1991 and 1992, the Applicant worked as a design consultant through a consulting company called Scavella Ltd. (Scavella). The Applicant was the sole shareholder and director of Scavella. On May 1, 1992, the Corporation was struck from the Alberta Corporate Registry for apparently failing to file tax returns.

[3] The CRA claims that it advised the Applicant's accountant by letter dated April 22, 1994, that the striking of Scavella may result in deemed dividends to the Applicant. The CRA alleges that it further advised the Applicant by letter dated May 9, 1995, that his 1991 and 1992 individual income tax returns would be adjusted as a result of the striking of Scavella. Specifically, taxable dividends would be added to the Applicant's income.

[4] The Respondent claims that the Applicant was reassessed on June 8, 1995, for the taxation years of 1991 and 1992. The 1991 reassessment resulted in a tax debt in the amount of $10,240.67, and the 1992 reassessment resulted in a tax refund in the amount of $404.69. The Applicant also has a tax debt in the amount of $918.30 resulting from an assessment for the 1993 taxation year. The Applicant alleges that he never received the 1991 notice of reassessment.

[5] The Respondent claims that from 1995 to 1999, statements were issued or balances were quoted to the Applicant or his authorized representatives referencing the tax debt which the Applicant now refutes. The amount owing was also indicated on the Applicant's four notices of assessment issued between 1996 and 1999.

[6] The Applicant admits that he was informed by a CRA officer in 1996 that he had a tax debt of more than $10,000.

[7] In 1998, the CRA issued two RTPs in an effort to collect the Applicant's tax debt. It appears that the Applicant, despite being advised of the tax debt in March 1996, waited until 2005 to find out why the CRA claimed he owed a tax debt. Details about the Applicant's tax debt were given to the Applicant's representatives in 2005 and 2006.

[8] In 2006 and 2007, the CRA issued four RTPs in an effort to collect the Applicant's tax debt.

[9] In November 2007, the Applicant applied to the Minister of National Revenue for an extension of time to file a notice of objection to the 1991 reassessment. The extension of time was refused on December 14, 2007. The Applicant did not apply to the Tax Court for an extension of time following the Minister's refusal.

[10] On February 22, 2012, the CRA issued an RTP to the CIBC, which is the subject of the present application for judicial review.

Issues

[11] The Applicant contends that the 2012 RTP and the 1991 reassessment are invalid because the Minister has failed to discharge its burden of proving the existence of the 1991 notice of reassessment and the date of its mailing. The Applicant submits that he never received the 1991

notice of reassessment, and that the files produced by the CRA in 2005 and 2006 contain no such notice of reassessment or any indication that the notice of reassessment was ever issued.

[12] According to the Applicant, the existence and validity of the alleged reassessment will come down to the credibility and content of the affidavit of the person designated by the Minister. In his view, the affidavit of that person (Mrs. Irene Van Zeumeren) does not confirm that the notice of reassessment was ever generated or mailed and, moreover, is deficient insofar as the affiant does not state that she had charge of the appropriate records. Finally, the Applicant also points to the following deficiencies in Mrs. Van Zeumeren's affidavit: a) she has only ever worked in collection and has never worked in audit; b) there are contradictions within her affidavit; and c) she claims that the documents were destroyed according to the CRA's policy but does not provide a copy of that policy or details on the destruction of those documents.

[13] Yet, all of these arguments are premised on the notion that the Federal Court has jurisdiction to determine the validity of the 1991 assessment. The Respondent vigorously disputes this assumption, and also submits that this application is out of time.

[14] The questions to be decided, therefore, are the following:

i) Does this Court have jurisdiction to determine the validity of the 1991 reassessment?

ii) Is the application out of time?

iii) Does the application have merit?

Analysis

i) Does this Court have jurisdiction to determine the validity of the 1991 reassessment?

[15] Pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, the Federal Court clearly has jurisdiction over the legality of collection measures by CRA officials: see *Fuchs v Canada*, [1997] 2 CTC 246, 129 FTR 168 (FC). Since the Applicant is apparently challenging an RTP, and since the application was filed within 30 days of the issuance of that RTP, this Court should *prima facie* be in a position to entertain it.

[16] Yet, the essence of this application is not a challenge of the RTP itself, but a challenge of the validity of the underlying reassessment. Although the issuance of a notice of reassessment is indeed an act of a federal board, commission or other tribunal pursuant to s 18.1 of the *Federal Courts Act*, Division J of Part I of the *Income Tax Act*, RSC 1985, c 1, establishes a complete appeal procedure for all issues related to reassessments. Subsection 12(1) of the *Tax Court of Canada Act*, RSC 1985, c T-2, provides that the Tax Court has original exclusive jurisdiction on matters arising under the *Income Tax Act*.

[17] Section 18.5 of the *Federal Courts Act* precludes an appeal to the Federal Court where a federal statute grants specific jurisdiction to, *inter alia*, the Tax Court. That section reads as follows:

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the	18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la

Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

[18] Counsel for the Applicant tried to distinguish between the substantive and the procedural validity of an assessment, arguing that the Tax Court has exclusive jurisdiction only over the former and not over the latter. Such a distinction is, however, unwarranted, and counsel for the Applicant cited no authority in support of that proposition. Indeed, the Court of Appeal came to the opposite conclusion in *Walker v Canada*, 2005 FCA 393, [2006] 1 CTC 130 [*Walker*]. In that case, the applicant was challenging an RTP on the basis that he had never received the notice of reassessment. The Court of Appeal confirmed that s 18.5 of the *Federal Courts Act* effectively removes from the jurisdiction of the Federal Court all matters related to reassessments:

> 15. An application for judicial review may be made to the Federal Court to challenge the legality of collection measures taken by the Minister to collect taxes allegedly due. However, the Federal Court's jurisdiction does not extend to an application involving an attack on the underlying reassessment on which collection measures are based. In the present case, the appellant says that the Minister cannot justify collection measures by relying on a reassessment allegedly made in May 1998 without proving that notice of it was mailed to him. This is sufficient to engage section 18.5.

[19] At the hearing, counsel for the Applicant tried to distinguish the case at bar from *Walker* and argued that this is not a case where the applicant argues that he never received the reassessment because it was not mailed to the correct address, but more dramatically that there is no evidence that a reassessment was ever made. In my view, this is a distinction without a difference. In both cases, the validity of the notice of reassessment must be determined, and it is irrelevant whether such a notice is invalid because it cannot be traced or because there is no evidence that it was mailed to the correct address. By virtue of s 12(1) of the *Tax Court of Canada Act*, the Tax Court has exclusive jurisdiction irrespective of the arguments being mustered against the notice of reassessment.

[20] Counsel for the Applicant made much of the decision rendered by Prothonotary Aalto in *Carter v Canada*, 2009 FC 846, 2009 DTC 5152. In that case, the Minister had sent a notice of reassessment to the wrong address in July 2007. The taxpayer learned of the notice and attempted to file a notice of objection more than 90 days after the notice was issued. The Minister refused to accept the notice of objection as it was out of time, and the taxpayer applied to this Court for judicial review of the Minister's decision. The Minister applied to strike the application on the basis that the Tax Court had exclusive jurisdiction to determine the matter. Prothonotary Aalto refused the Minister's application to dismiss.

[21] First, it bears noting that Prothonotary Aalto's order was set aside by Justice O'Keefe in *Carter v Canada*, [2009] FCJ 1308, although no reasons were provided. It should also be noted that Prothonotary Aalto's order was made in the context of a motion to strike brought by the Minister.

[22] More importantly, it appears from a careful reading of the Prothonotary's order that he was concerned with the apparent absence of a remedy for the taxpayer if the Federal Court did not assume jurisdiction, since the applicant had not filed (or could not file) an objection within the prescribed period. It is far from clear, however, that a taxpayer is without recourse before the Tax Court because he or she did not file a notice of objection within 90 days of the alleged mailing of the notice of reassessment (or failed to request an extension of time within one year), if it is claimed that the notice of reassessment was never received. The time for filing an objection starts to run on the day of the mailing of the notice of reassessment. It if can be demonstrated that the notice was sent to the wrong address, or for that matter was never sent or never made, the Tax Court would have jurisdiction to grant an extension of time (*Aztec Industries Inc v Canada* (1995), 179 NR 383, [1995] 1 CTC 327 (FCA)).

[23] In any event, it would seem improper that a taxpayer would gain access to relief from this Court simply by waiting for the prescribed period for objections and appeals to expire. In *Lazar v Canada (Attorney General)* (1999), 168 FTR 11, 87 ACWS (3d) 1241, Justice Evans wrote, at para 18:

> It would surely be anomalous if, by the simple expedient of failing to appeal in time, an applicant were able to avoid having to use a statutory right of appeal before invoking the Court's supervisory jurisdiction.

[24] It is also telling that the Applicant could only apply to this Court because he failed to appeal to the Tax Court within 90 days of the Minister's refusal to grant him an extension of time when he filed an objection to the 1991 reassessment in 2007.

[25] For all of the above reasons, I am therefore of the view that the Federal Court, despite having jurisdiction over the legality of RTPs, does not have jurisdiction on issues related to the underlying reassessment, whether or not the validity of the reassessment is raised. In a case such as the case at bar, the challenge of the RTP is merely collateral to a challenge of the underlying reassessment.

ii) Is the application out of time?

[26] Even assuming that this Court has jurisdiction over the validity of the 1991 reassessment, I agree with the Respondent that the application was commenced after the limitation period expired.

[27] The Applicant, by his own admission, learned of his tax debt in March 1996, nine months after the 1991 reassessment was issued on June 8, 1995. Had he then made inquiries, which could be reasonably expected, he would have learned of the 1991 reassessment and presumably he would have received a copy of the notice of reassessment. Assuming that the notice of reassessment was indeed never mailed by the CRA in 1995, the Applicant could have challenged the reassessment 90 days after the reassessment was actually mailed, and he could have sought an extension of time one year after the expiration of that period, as a result of ss 165(1), 166.1(1) and 166.1(7) of the *Income Tax Act*. The Applicant, however, chose not to inquire about his tax debt and waited until November 2007 to apply for an extension of time to file a notice of objection, claiming that he did not receive notice of the 1991 reassessment. When the Minister denied the Applicant's request in December 2007, he did not seek redress from the Tax Court. Instead, he waited another four years to commence these proceedings.

[28] This application is subject to section 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, according to which he had six years after his cause of action arose to commence the application. A cause of action is "a set of facts that provides the basis for an action in court": *Doig v Canada*, 2011 FC 371, at paras 30-31, 387 FTR 156. In the present case, the Applicant's cause of action arose when he knew or ought to have known of the Minister's assertion that he owed a tax debt and began collection actions against him to recover that debt – that is in March 1996. Accordingly, the Applicant should have commenced proceedings on or before March 2002.

[29] Aside from the fact that the Applicant was told by a collection officer in March 1996 that he owed over $10,000, there is considerable evidence that the Applicant knew, or ought to have known, of his cause of action prior to the expiry of the six-year limitation period (i.e. February 2006). Statements were issued or balances were quoted to the Applicant or his representative between June 1995 and December 1999, referencing the tax debt which the Applicant now refutes. During the period of May 1996 to December 1999, the Respondent issued four Notices of Assessment to the Applicant which referenced the tax debt. From September 2004 to February 2006, there was email and letter correspondence as well as telephone conversations between the Applicant or his representative and the Respondent whereby he was made aware that there were attempts to collect the tax debt and his tax situation was discussed. The Applicant cannot credibly pretend, therefore, that he only became aware of his tax debt and of the 1991 reassessment less than six years before filing his application for judicial review.

[30] As a result, there is no need to look into the merit of the Applicant's claim that the 1991 reassessment does not exist. If there are no remaining hard copies of the relevant documents, it is so

only because the Applicant failed to take action in March 1996 or shortly thereafter. Had he done so, witnesses and documents would be available, and he would have been able to properly challenge the validity of the 1991 reassessment.

[31] Consequently, this application for judicial review is dismissed, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, with costs.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	JOHN RITTER v MINISTER OF NATIONAL REVENUE
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APPEARANCES:

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