Federal Court  Cour fédérale

Date: 20130524

Docket: T-179-11

Citation: 2013 FC 547

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, May 24, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MICHEL BEAUDRY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Canada Revenue Agency (the CRA) regarding the tax that Michel Beaudry (the applicant) allegedly failed to pay on his income in the years 2004 and 2005. The applicant is seeking a declaration that (1) the taxes, deductions and withholdings, as assessed by the Minister on the taxable income for 2004 and 2005, have already been paid through deductions at source; (2) the employer is responsible for paying the taxes, deductions and withholdings, as assessed by the Minister in respect of the

taxable income for 2004 and 2005; and (3) the applicant has already paid the taxes, deductions and withholdings claimed by the Minister for the years 2004 and 2005.

[2] Having carefully considered the evidence in the record, as well as the written submissions and oral arguments of the parties, I find that this application for judicial review must be dismissed. My reasons follow.

I. Facts

[3] The applicant alleges that he was hired by Compu-Finder Inc (Compu-Finder) to work as a client consultant through Solutions C.I.M.E., a company of which he was the president and sole shareholder. After a few months of working as a self-employed worker, that is, from October 2002 to March 2003, he allegedly became a full-time employee as a senior adviser.

[4] On March 31, 2003, the applicant allegedly wound up Solutions C.I.M.E., which would indicate that he did indeed become an employee of Compu-Finder as of April 1, 2003. From then on, Compu-Finder paid his salary directly to him personally. On August 1, 2003, the applicant was appointed to the position of Vice-president, Development and Special Projects, a position which he held until October 29, 2005.

[5] The applicant filed his tax return for the 2004 taxation year online, on or about February 23, 2005. He did not submit any T4 slips with the return, as this is not required when filing tax returns electronically. He filed his tax return for the 2005 taxation year, along with a T4 slip, on or about April 30, 2006.

[6] The applicant states that in February 2005, his 2004 T4 slip was hand delivered to him by Sylvie Pagé, a representative of Compu-Finder. He further states that he received his 2005 T4 slip by mail in February 2006. These slips respectively indicated employment income of $98,250.00 and $91,858.30 and source deductions for federal tax of $22,784.35 and $17,453.32.

[7] According to the respondent, the T4 slips issued and sent by an employer to the CRA are recorded in the CRA's computer system under both the social insurance number (SIN) of the taxpayer and the business number (BN) of the company issuing the slips. However, it is alleged that the T4 slips provided by the applicant for the 2003 and 2004 taxation years were not recorded in the CRA's system under the applicant's SIN or Compu-Finder's BN. The information in the 2005 T4 slip issued and sent in by Compu-Finder and recorded in the CRA's system did not match the information in the T4 slip filed by the applicant with his income tax return; Compu-Finder's slip reported $27,552.00 in employment income (rather than $91,858.30) and $2,882.48 in deductions at source for income tax (rather than $17,453.32).

[8] On October 19, 2005, the Compliance Section of the CRA made a verbal request to the applicant for any supporting documentation that could substantiate the $22,784.35 in deductions at source allegedly made by Compu-Finder in 2004. When the applicant failed to provide any such proof, the CRA assessed the amount of the deductions at $0 for the 2004 taxation year.

[9] On May 10, 2006, the CRA asked the applicant to submit his paystubs for 2005. The applicant only submitted paystubs covering the period from May 31 to July 23, 2005. On

May 31, 2006, the CRA notified the applicant that it deemed this information to be insufficient and confirmed the adjustment imposed for the 2004 taxation year.

[10] Curiously, it appears from the affidavit filed by Chantal Guertin, a trust accounts auditor at the CRA, that on December 13, 2006, the applicant told the Collections Division that Compu-Finder had not given him any T4 slips for the three years he worked for the company.

[11] Ms. Guertin was responsible for auditing the income derived from the business relationship between the applicant and Compu-Finder and for determining the amount of the deductions at source, if any, made from the amounts paid to the applicant for his services. She had an initial conversation with the applicant on March 22, 2007, during which he repeated that he had been hired as Manager, Development, on March 31, 2003, until July 31, 2003, and then as Vice-President, Development, from August 1, 2003 to October 29, 2005. In support of his claim that he had been hired as an employee, the applicant stated that he had wound up his company, Solutions C.I.M.E., on March 31, 2003. However, the contract for services at issue was signed by Compu-Finder and Solutions C.I.M.E. (represented by the applicant) on September 18, 2003. Compu-Finder also acknowledged that the applicant was a vice-president at the company, but only from June 2005; the company states that before that, he merely acted as a consultant.

[12] On May 30, 2007, Ms. Guertin went to the offices of Compu-Finder's accountant to audit the company's payroll records and accounting documentation. She also spoke with Ms. Pagé, Compu-Finder's representative. Ms. Pagé stated that the applicant had been hired as a consultant from 2002 to 2005 and invoiced the services he rendered through his company, Solutions

C.I.M.E.; he did not become an employee of Compu-Finder until June 2005, when he was offered the vice-president position. Ms. Pagé also stated that Compu-Finder had not prepared the T4 slips that the applicant had submitted. Finally, she said that from November 28, 2003, the applicant was paid directly by cheque even though the services continued to be invoiced by Solutions C.I.M.E.; the applicant had allegedly insisted on this arrangement because Solutions C.I.M.E. was having difficulties with its financial institution.

[13] Ms. Guertin also states that she compared the three T4s filed by the applicant with those of other employees and noticed that the applicants' T4s were not in the same format as those usually issued by Compu-Finder and all had different business numbers, none of which matched Compu-Finder's business number.

[14] On the basis of this information, the CRA informed the applicant on August 2, 2007, that it found that he had held insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act*, SC 1996, c 23, with Compu-Finder in 2004 and 2005. This decision was confirmed by the CRA on February 27, 2008, following an appeal of the initial decision, lodged by Compu-Finder.

[15] Since Compu-Finder had considered the applicant to be self-employed worker from 2002 to June 2005 and therefore had not made deductions at source on the payments it was making for his services, Ms. Guertin drew up the T4 slips on the basis of information she gathered in the course of her audit of the books and records of Compu-Finder in 2007. She determined that the applicant's employment income for 2004 and 2005 were $71,838.83 and $72,510.86,

respectively, and that the source deductions for income tax had been $0 (for 2004) and $2,882.48 (for 2005). The CRA informed the applicant of the changes to his T4 slips in a letter dated November 26, 2008.

[16] On March 19, 2009, the CRA issued reassessments for the years 2004 and 2005, requiring the applicant to pay $45,504.56 and $40,197.04, respectively. After receiving notices of objection from the applicant, the CRA confirmed its assessments for 2004 and 2005. The applicant was informed of that decision on October 30, 2009, by Réjean Michaud, Team Leader, Appeals Division, Quebec Region.

[17] A few days before the scheduled hearing on the merits in this matter, the applicant filed a motion for leave to file two further affidavits. These two affidavits had already been submitted to the CRA on October 15, 2009, but were not part of the applicant's record in this Court. At the hearing, I allowed the filing of these affidavits and adjourned the hearing to allow the respondent to cross-examine the two deponents and file a supplementary affidavit.

[18] In his affidavit, Daniel Plourde writes the following:

> [TRANSLATION]
> I hereby confirm that I was present, in the month of February 2005, when 3510395 Canada Inc. (Compu-Finder) issued the T-4 slips.
>
> Sylvie Pagé gave me my T-4 and Michel R. Beaudry his T-4 for 2004, in person. I confirm that I was present at the scene and that Michel R. Beaudry did indeed receive his T-4 from Sylvie Pagé.

[19] The affidavit of Lucie Lafrenière, the applicant's spouse, reads as follows:

> [TRANSLATION]
> I hereby attest that in the month of February 2006, I received by Canada Post, from Compu-Finder (3510395 Canada Inc.), the T-4 slip of Michel R. Beaudry for the year 2005.
>
> The amounts stated on the T-4 were as follows:
>
> - Gross salary: 91,858.30
> - Federal tax: 17,453.32
> - Employment Insurance: 761.00
> - Quebec Pension Plan: 1,861.20
> - Box 42: 4,852.65

[20] In his affidavit filed in reply to the above two affidavits, Joël Dumoulin, the CRA appeals officer responsible for handling the objections lodged by the applicant regarding the notices of reassessment for the years 2004 and 2005, explained why these affidavits were deemed not to be credible. First, regarding the affidavit of Mr. Plourde, Mr. Dumoulin pointed out that Mr. Plourde could not have received a T4 slip for 2004 at the same time as the applicant because he was not employed by Compu-Finder in 2004. The list of T4s issued by Compu-Finder and sent to the CRA for the years 2004 and 2005 also attests to the fact that Mr. Plourde did not received a T4 from Compu-Finder for 2004. Mr. Plourde admitted his error on cross-examination.

[21] What is more, the two affidavits contradict the applicant himself, since he stated in his notice of objection for the 2004 taxation year that he had received the T4 slips for 2003, 2004 and 2005 from Alain Guyot, a vice-president at Compu-Finder, and not from Ms. Pagé. Moreover, he repeated this statement in a letter to the Director, Audits at the CRA's office, dated April 4, 2009, and his counsel did the same in a letter to Brigitte Bergeron of the CRA, on February 24, 2009.

II. Issue

[22] The only issue in this case is whether Compu-Finder did indeed withhold the tax on the amounts it paid to the applicant for the 2004 and 2005 taxation years and, if so, whether these deductions at source match the amounts reported by the applicant or those determined by the CRA.

III. Analysis

[23] First of all, it should be noted that this Court has jurisdiction over the present case because the taxpayer is not seeking to have the assessment vacated or varied (which falls within the exclusive jurisdiction of the Tax Court of Canada under subsection 169(1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp)); rather, he intends to show that he has already paid the amounts he owes. It is trite law that the Federal Court has jurisdiction over such matters:

> In this case the applicant is not seeking to have the disputed assessments vacated or varied. Rather, she is claiming that the taxes as assessed by the Minister have already been paid by way of a deduction at source (see subsection 227(9.4), which *inter alia* makes the employer liable for the taxes owing by an employee up to and including the amounts deducted from the salary and not remitted). In these circumstances, the judge below rightly held that she did not have jurisdiction and it was therefore wrong for her to consider the dispute on its merits.
>
> The problem raised by the applicant is a collection problem. In this regard, section 222 assigns jurisdiction to the Federal Court in these words:
>
> > All taxes, interest, penalties, costs and other amounts payable under this Act are debts due to Her Majesty and recoverable as such in the Federal Court . . . .
>
> ***

> Tous les impôts, intérêts, pénalités, frais et autres montants payables en vertu de la présente loi sont des dettes envers Sa Majesté et recouvrables comme telles devant la Cour fédérale . . . .
>
> Insofar as the applicant claims to have already paid the taxes being claimed from her, she may assert her rights in the Federal Court when the Minister attempts to recover the sums he considers payable. . . .
>
> *Neuhaus v Canada*, 2002 FCA 391 at paras 4-6, [2003] 2 CTC 177.
>
> See also, to the same effect: *Boucher v Canada*, 2004 FCA 47, [2004] 2 CTC 174; *Welford v Canada*, 2009 TCC 464, [2009] TCJ no 365.

[24] Having carefully reviewed the evidence on record, and considering the submission made by counsel representing each of the parties, I find that there is enough factual evidence for the Court to conclude, on a balance of probabilities, that no deductions at source were made on behalf of the applicant in 2004 and for a portion of 2005 (until June), and that he is therefore not entitled to any relief for these two years.

[25] First, I note that the applicant appears to have changed his version of the facts. At the very beginning of the audit process for the year 2005, on December 13, 2006, he stated that he never received any T4 slips from Compu-Finder (Respondent's Record, Affidavit of Chantal Guertin, Exhibit 6). However, he later submitted that he had received such slips from Compu-Finder for the years 2004 and 2005 and had given them to the CRA.

[26] Second, the T4 slips filed by the applicant are different from those usually issued by the company. The slips filed by the applicant have different business numbers, none of which

matches that of Compu-Finder. What is more, the applicant's T4 slips are patently different in format from the T4 slips issued to the company's other employees.

[27] It is also important to consider the fact that Compu-Finder initially hired the services of Solutions C.I.M.E., a company owned by the applicant, under a contract entered into by these two companies. It was therefore normal for Compu-Finder not to make the deductions at source provided for in section 153 of the *Income Tax Act*. Compu-Finder never considered the applicant to be one of its employees during the 2004 taxation year and the first six months of 2005; otherwise, it would have been required to withhold amounts for tax at source. The fact that cheques were made out to the applicant personally rather than Solutions C.I.M.E. starting in November 2003 does not mean that Compu-Finder recognized him as an employee. Moreover, according to Compu-Finder, it was the applicant himself who asked that the cheques from then on be made out in his personal name rather than in the name of the company. It is also curious that the contract for services was entered into with Solutions C.I.M.E. in September 2003, when this company had been struck off the register more than four months earlier, on May 2, 2003.

[28] Indeed, one cannot help but wonder if the applicant was not trying to have his cake and eat it too. On the one hand, it appears that the applicant never told Compu-Finder that Solutions C.I.M.E. no longer existed when he signed a contract for services, or even afterwards, since he continued to issue invoices on his company's letterhead until 2005. On the other hand, when the applicant filed his tax returns, he declared that he was a Compu-Finder employee, whereas Compu-Finder thought it was doing business with Solutions C.I.M.E. This would be consistent with the statement made by Ms. Pagé to the effect that Compu-Finder started giving him cheques

in his own name rather than in the name of Solutions C.I.M.E. because the applicant requested it, and not because the applicant had become an employee.

[29] I also note that according to Compu-Finder's files, the applicant did not become one of its employees until June 10, 2005, which tends to corroborate the respondent's argument to the effect that he was considered to be a self-employed worker until that date and that Compu-Finder was not required to withhold amounts for tax purposes.

[30] In short, I find that the CRA could reasonably reject the amounts of the deductions alleged by the applicant and confirm the notice of assessment issued after the audit of Compu-Finder. The evidence on record does not sit well with the applicant's version of the facts, and the affidavits that he filed in support of his arguments are unreliable. In addition, he chose not to cross-examine the respondent's witnesses, so there affidavits must be accepted as true. Finally, the applicant did not respond to the CRA's request to provide further information to validate the information on the T4 slips he filed, nor did he submit any evidence (apart from the paystubs for the period from May 31 to July 23, 2005) substantiating in any way whatsoever his argument to the effect that he had received the wages from which the deductions at source had allegedly been made.

[31] In the alternative, the applicant submitted that it is the employer that is responsible for deducting taxes at source from employees' wages. The applicant therefore argues that it was not up to him to pay the amounts owing to the Receiver General, as this was Compu-Finder's

responsibility. This argument is inconsistent with the requirements of the *Income Tax Act* and with the case law on the liability of an employer that fails to make deductions at source for tax.

[32] As the respondent states, subsection 227(8) of the *Income Tax Act* merely imposes a penalty on employers for failing to withhold income tax. In other words, an employer's failure to withhold the tax does not relieve the employee, in this case, the applicant, of the obligation to pay the tax due. Accordingly, the tax authorities are entitled to turn to the employee who received a gross salary and claim the entire tax debt from him or her. The Federal Court of Appeal could not have expressed itself more clearly on this point in *Coopers & Lybrand v R*, [1981] 2 FC 169 at para 45:

> If the person paying fails to deduct, his failure has no effect on the liability of the employee for income tax it being assumed that the taxing authority will recover from the employee the full amount of the income tax; the only liability incurred by the person paying the salary or wage is a penalty calculated as a percentage of the amount he has failed to deduct.

[33] For all these reasons, the application for judicial review must therefore be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed, with costs.

"Yves de Montigny"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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