

Date: 20081021

Docket: 08-A-62

Citation: 2008 FCA 314

Present: SHARLOW J.A.

BETWEEN:

**1344746 ONTARIO INC.
and JAMES VIDAL**

Applicants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 21, 2008.

REASONS FOR ORDER BY:

SHARLOW J.A.

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REASONS FOR ORDER

SHARLOW J.A.

[1] The applicants ask for reconsideration of my order of September 19, 2008. In that order I dismissed the applicants' motion for an extension of time to commence an appeal under subsection 172(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). They seek to challenge the notice given by the Minister of National Revenue of his intention to revoke the registration of the Pension Plan for Presidents of 1344746 Ontario Inc. (the Plan).

First motion

[2] To understand my disposition of the applicants' motion for reconsideration, it is necessary to understand why the applicants' first motion was dismissed.

[3] From material filed by the applicants, it appears that the Minister's decision was based on certain factual conclusions he had reached, as set out in this letter dated December 19, 2006 (exhibit C to the affidavit of Brigitte Dioguardi sworn August 20, 2008).

[4] I summarize the Minister's factual conclusions as follows. The Plan was registered on March 10, 1999. The Minister initially was informed that the only member of the Plan was the applicant James Vidal, an employee of 1344746 Ontario Inc. On September 10, 1999, a sum of money was transferred to the Plan on Mr. Vidal's account from another registered pension plan, apparently representing pension credits accumulated over approximately 30 years with another employer. Over the next three years, approximately 20% of that amount was paid to Mr. Vidal. The Minister's audit was commenced at a time when the Minister's records showed no employment earnings for Mr. Vidal from 1344746 Ontario Inc. for the years 1999, 2000, 2001, 2002 or 2003. The Minister was informed by the applicants that Mr. Vidal was an employee of 1344746 Ontario Inc. in April, May and June of 1999. However, the only documentary evidence sent to the Minister in support of that information had apparently been prepared after the commencement of the audit. The Minister says he received no pay stubs, pay cheques or T4 slips issued to Mr. Vidal in relation to his purported employment with 1344746 Ontario Inc.

[5] It appears that the Minister concluded, on the basis of these facts, that the Plan did not meet the purpose test in paragraph 8502(a) of the *Income Tax Regulations*, C.R.C. 1978, c. 945. That provision states that a pension plan does not meet the conditions for registration under the *Income Tax Act* unless its purpose is to provide lifetime retirement benefits to members in respect of their

service as employees with the employer. Whether that purpose exists in a particular case is a question of fact to be determined by the Minister. This Court will not intervene in that determination if it is reasonable based on the evidence available to the Minister when the determination is made (see *Loba Limited v. M.N.R.*, 2004 FCA 342).

[6] The basis of the applicants' first motion for an extension of time was that counsel for the applicants was retained only on August 3, 2008 and did not have enough time to meet the filing deadline of August 17, 2008. That motion was dismissed because the motion record disclosed no arguable case on appeal (see *Pharmascience Inc. v. Canada (Minister of Health) (F.C.A.)*, [2004] 2 F.C.R. 349, at paragraph 6).

Reconsideration motion

[7] The applicants now ask for reconsideration of my order pursuant to Rule 397(1)(b), *Federal Courts Rules*, SOR/98-106. That provision reads as follows:

397. (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that

(a) [...]

(b) a matter that should have been dealt with has been overlooked or accidentally omitted.

397. (1) Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :

a) [...]

b) une question qui aurait dû être traitée a été oubliée ou omise involontairement.

[8] In the material filed in support of the applicants' motion for reconsideration, counsel for the applicants argues that he had "overlooked the appropriate procedure by which to challenge" the Minister's decision. It appears that counsel for the applicants initially believed that a statutory appeal from a decision of the Minister should be commenced by a notice of application for judicial review, and now understands that it should be commenced by a notice of appeal.

[9] If the argument for the applicants is that this mistake by counsel can be the basis for reconsidering an order, it is ill founded. Rule 397(1)(b) permits a judge to reconsider an order to be reconsidered if the judge overlooked or accidentally omitted a matter that should have been considered. A mistake by counsel in framing a motion cannot justify reconsideration of the order disposing of the motion. In any case, the misunderstanding of counsel on the proper form was not relevant to the dismissal of the initial motion for an extension of time.

[10] Counsel for the applicants also submits that there is an arguable case on appeal. This argument was not made in the first motion. As I understand the argument, it is based on evidence that counsel for the applicants proposes to submit on the appeal to prove the following facts: (1) Mr. Vidal was employed by 1344746 Ontario Inc. for three months in 1999 but could not continue his employment due to a severe illness; and (2) later financial difficulties required the Plan to be wound up in early 2006. Counsel for the applicants submits that these facts will "disprove" the Minister's conclusion that the Plan did not meet the purpose test when it was registered in March of 1999. I cannot give effect to this submission as a basis for reconsidering my previous order. It was

not an argument that was made in support of the first motion and therefore it does not speak to any matter that I overlooked or accidentally omitted.

[11] I would add that, even if I were to reconsider my previous order, I would reach the same conclusion and dismiss the motion for an extension of time. In my view, even if the facts as stated by counsel are true, they would not make the Minister's decision unreasonable unless evidence of those facts had been given to the Minister before he rendered his decision. I see nothing in the material submitted by the applicants to establish that the Minister was informed of these facts or that the Minister unfairly denied the applicants an opportunity to inform him of these facts.

[12] Finally, I note that counsel for the applicants appears to have assumed that an appeal under subsection 172(3) of the *Income Tax Act* is the same as an appeal from an income tax assessment. That is not a correct assumption. An income tax appeal is commenced in the Tax Court of Canada and is determined on the basis of a trial at which the appellant and the Minister may present evidence that may not have been before the Minister when issuing the assessment under appeal. In contrast, an appeal of the Minister's notice of intention to revoke the registration of a pension plan must be commenced in this Court, and is determined using a procedure that is more like a judicial review of the Minister's decision. As mentioned above, this Court has held that it will not intervene in the Minister's determination of the purpose of a pension plan if the determination is reasonable, based on the evidence available to the Minister when the determination is made.

Conclusion

[13] The motion for reconsideration will be dismissed with costs.

“K. Sharlow”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: 08-A-62

STYLE OF CAUSE: 1344746 Ontario Inc. and James Vidal
v. The Minister of National Revenue

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: SHARLOW J.A.

DATED: October 21, 2008

WRITTEN REPRESENTATIONS BY:

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