Federal Court  Cour fédérale

Date: 20160120

Docket: T-1623-15

Citation: 2016 FC 66

Vancouver, British Columbia, January 20, 2016

PRESENT: Prothonotary Roger R. Lafrenière

BETWEEN:

MAO LAN FENG

Applicant

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA
(THE MINISTER OF NATIONAL REVENUE)

Respondent

JUDGMENT AND REASONS

UPON MOTION in writing dated December 16, 2015, on behalf of the Respondent pursuant to Rule 369 of the *Federal Courts Rules* for:

(a) an order pursuant to Rule 221 of the *Federal Courts Rules* (SOR/98-106) striking out the application filed on September 24, 2015 (the "application");

(b) alternatively, an order extending the time for the Respondent to serve its supporting affidavits and documentary exhibits and to file proof of service of same pursuant to Rule 307, to cross-examine on affidavits and to serve and file the Respondent's Record;

(c) costs of this motion; and

(d) such further and other relief as this Honourable Court may deem appropriate.

AND UPON reading the motion records filed on behalf of the parties, and the Respondent's written representations in reply;

[1] On September 24, 2015, the Applicant filed a Notice of Application seeking judicial review pursuant to section 18.1 of the *Federal Courts Act* [FCA] of a decision of the Minister of National Revenue (the Minister) made on August 25, 2015 not to extend the time within which a notice of objection was required to be filed by the Applicant to a Notice of (Re)assessment of GST dated December 3, 2009. The Applicant seeks an order of mandamus compelling the Minister to extend the time to file a notice of objection and requiring the Minister to accept the Applicant's notice of objection as a valid objection for the purposes of section 301 of the *Excise Tax Act* [ETA].

[2] The relevant facts, as asserted in the Notice of Application, may be summarized as follows. In 2009, the Canada Revenue Agency (CRA) conducted a combined income tax and Goods and Services Tax/Harmonized Sales Tax (GST/HST) audit of the Applicant and her spouse for the reporting periods of 2005, 2006 and 2007 (the Relevant Period). By Notice of

(Re)assessment dated December 3, 2009, the Minister fixed the Applicant's tax liability under the ETA in respect of the Relevant Period for net GST payable, penalties and interest arrears totalling $42,089.95.

[3] The Applicant was advised by her authorized representative that it was not necessary to file a notice of objection to the GST assessment because any changes to the income tax payable by the Applicant in respect of the Relevant Period would automatically give rise to reassessments of the GST payable by the Applicant. The Applicant appealed the reassessment of her income tax to the Tax Court of Canada (Tax Court) in 2012 and ultimately discontinued her appeal following the issuance of a further income tax assessment by the Minister on November 28, 2014.

[4] By letter dated June 10, 2015, the Applicant requested that the Minister extend the time to file a notice of objection to the GST (Re)assessment pursuant to subsection 281(1) of the ETA. The Minister refused to extend the time on the grounds that the Applicant did not file a notice of objection or request an extension to do so within the time limits set out in subsection 303(7) of the ETA.

[5] The Respondent (who is incorrectly named as Her Majesty the Queen in Right of Canada in the style of cause instead of the Attorney General of Canada) has moved for an order pursuant to Rule 221 of the *Federal Courts Rules* (*Rules*) striking the Notice of Application on the grounds that the application has no reasonable prospect of success.

[6] Rule 221 is contained in Part 4 of the *Rules*, which applies to all proceedings that are not applications or appeals. Rule 221(1) provides that a statement of claim may be struck out on the ground that it discloses no reasonable cause of action. There is no corresponding rule in Part 5 of the *Rules*, which governs proceedings brought by way of application, for striking out a notice of application. This characteristic was discussed by Mr. Justice Barrry Strayer of the Federal Court of Appeal in the decision in *David Bull Laboratories (Canada) Inc* v *Pharmacia Inc*, 1994 CanLII 3529 (FCA), (*David Bull*) at pages 596 and 597:

> [...] the direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself. [...]

[7] Justice Strayer nonetheless concluded that this Court had jurisdiction, in very exceptional cases, to strike a notice of application, at page 600:

> [...] This is not to say that there is no jurisdiction in this Court either inherent or through Rule 5 [now Rule 4] by analogy to other rules, to dismiss in summary manner a notice of motion which is so clearly improper as to be bereft of any possibility of success. Such cases must be very exceptional and cannot include cases such as the present where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion.

[8] In my view, this case falls squarely within the *David Bull* exception. The application for judicial review is clearly bereft of any possibility of success as the existence of a right to appeal the Minister's decision to the Tax Court, whether exercised or not, is a bar against judicial review.

[9] Subsection 303(1) of the ETA provides that where no objection to an assessment is filed under section 301, or no request has been made under subsection 274(6), within the time limit otherwise provided, a person may make an application to the Minister to extend the time for filing a notice of objection. A person who has made an application under section 303 may apply pursuant to subsection 304(1) to the Tax Court to have the application granted after the Minister has refused the application no later than thirty days after the day the decision has been mailed to the person under subsection 303(5).

[10] In enacting sections 301 to 306, Parliament has provided a complete statutory framework for the exercise by a person of the right to dispute the validity of a tax assessment, all within clear and stringent timeframes. The essential character of the present application for judicial review is a collateral attack of the validity of the Minister's assessment which is not only time-barred under the ETA, but also barred by section 18.5 of the FCA.

[11] Section 18.5 provides that, to the extent that a matter may be appealed under a statute, judicial review is not available. Pursuant to section 12 of the *Tax Court of Canada Act*, the Tax Court has exclusive original jurisdiction to hear and determines appeals relating to assessments of tax under the ETA, as well as applications for extensions of time under section 304 of the ETA.

[12] The fact that the Tax Court may not be able to grant any relief to the Applicant under subsection 304(1) because the statutorily prescribed time limits for filing a notice of objection or to seek an extension of time have expired does not allow the Applicant to circumvent the comprehensive system of tax assessments and appeals established by the Parliament. It is simply

not open to the Applicant to indirectly challenge the Minister's decision in this Court by mischaracterizing the decision as a denial under subsection 281(1) of the ETA.

[13] Being substantially in agreement with the written representations filed by the Respondent, and in particular the Respondent's reply submissions, which I adopt and make mine, I conclude that the application should be dismissed on the grounds that it is bereft of any possibility of success. The application is an improper collateral attack of the Minister's decision of August 25, 2015 and constitutes an abuse of process.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended by removing Her Majesty the Queen in Right of Canada (The Minister of National Revenue) and substituting the Attorney General of Canada as the Respondent.

2. The application for judicial review is dismissed.

3. Costs of the motion, hereby fixed in the amount of $750.00, inclusive of disbursements and taxes, shall be paid by the Applicant to the Respondent.

"Roger R. Lafrenière"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1623-15
STYLE OF CAUSE:	MAO LAN FENG v HER MAJESTY THE QUEEN IN RIGHT OF CANADA (THE MINISTER OF NATIONAL REVENUE)
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA PURSUANT TO RULE 369	JANUARY 20, 2016
JUDGMENT AND REASONS:	LAFRENIÈRE P.
DATED:	JANUARY 20, 2016

APPEARANCES:

Michelle Moriartey	FOR THE APPLICANT
Jasmine Sidhu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Legacy Tax + Trust Lawyers Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT