Federal Court  Cour fédérale

Date: 20160927

Docket: T-393-15

Citation: 2016 FC 1086

Ottawa, Ontario, September 27, 2016

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

CGI HOLDING LLC

Applicant

And

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, CGI Holding Inc. [CGI], is a limited liability company [LLC] created under the laws of the State of Delaware in the United States. In Canada, under the *Income Tax Act*, RSC 1985 [*ITA*], CGI is considered a non-resident for income tax purposes. CGI seeks a refund from the Respondent Minister of over $28 million that it paid in withholding tax in 2007.

[2] In 2007, CGI (then known as Chrysler Holding LLC) received a dividend payment of just over $142 million from its related Canadian resident corporation, 3208170 Nova Scotia

Company [NSULC], as the result of a corporate reorganization. At that time, subsection 212(2) of the *ITA* was interpreted by the Canada Revenue Agency [CRA] as requiring a withholding of 25% for income tax on dividends paid by a Canadian resident (NSULC) to a non-resident (CGI). Accordingly, a payment of over $35 million, representing 25% of the dividend, was made to the CRA.

[3] In 2010, the Tax Court of Canada issued a decision in *TD Securities (USA) LLC* v *The Queen*, 2010 TCC 186, [*TD Securities*]. As a result, the CRA changed its position on the withholding tax requirement by a LLC in circumstances where *The Canada-United States Income Tax Convention* (the Treaty) apply.

[4] As a result of *TD Securities*, CGI argues that the provisions of the Treaty apply to the 2007 dividend payment. If so, this would mean 5% and not 25% of the dividend amount should have been withheld. This is a difference of over $28 million and is the amount CGI has claimed it is owed by way of a refund.

[5] The position of CRA is that CGI is not entitled to a refund under the Treaty because the facts and circumstances of the CGI 2007 dividend payment are distinguishable from the *TD Securities* case.

II. Background

[6] In 1980, Canada and the United States entered into the Treaty *(Convention between Canada and the United States of America with respect to Taxes on Income and on Capital, September 26 1980, Can TS 1984 No 15)* to avoid double taxation on the part of their respective

taxpayers. It came into force in 1984 and in Canada is implemented by *the Canada-United States Tax Convention Act*, 1984, SC 1984, c 20.

[7] Both countries have designated "Competent Authorities" to deal with claims under the Treaty. The Competent Authority in Canada is the CRA. In the United States, it is the Internal Revenue Service [IRS]. The phrases Competent Authority, IRS, and CRA are used interchangeably throughout these reasons.

[8] In March 2012, CGI applied to the CRA for the refund, however, the CRA denied CGI's refund request because the 2 year limitation period in subsection 227(6) of the *ITA* had expired. The CRA did however accept the refund request as timely notification under the Treaty to engage the Mutual Agreement Procedure (or MAP process) as provided for in Article XXVI of the Treaty. The MAP process provides taxpayers with a dispute resolution mechanism for tax relief claims under the Treaty.

[9] In July 2013, CGI sought Competent Authority assistance from the IRS under the Treaty. On November 4, 2013, the IRS formally opened the MAP process by sending a letter to the CRA requesting that it issue CGI the refund as requested.

[10] The MAP process does not directly involve the taxpayer. The Competent Authorities (IRS and CRA) deal directly with each other. However, as it will be addressed in more detail below, CGI did have the opportunity to provide information and input during the MAP process.

[11] On February 13, 2015, CGI was advised by the IRS that the two Competent Authorities were unable to reach a mutual agreement, and that the matter was concluded.

[12] CGI seeks judicial review of the conduct of the CRA throughout the MAP Process. CGI claims that the CRA did not understand the business purpose of the corporate reorganization which resulted in the dividend payment. CGI also submits that the CRA either failed, or refused, to properly inform itself on the issue of "full and comprehensive" taxation of the dividend in the United States. CGI argues that its procedural fairness rights were not respected by the CRA during the MAP process. CGI seeks *mandamus* relief and asks that this Court order the Minister to issue a notice assessment under the *ITA*, because unless or until an assessment is issued, CGI has no recourse to the Tax Court of Canada.

[13] The Minister argues that this Court has no jurisdiction over treaty discussions between Canada and the US. The Minister also argues that there is no "decision" to judicially review. Further, the Minister submits that if this Court does have jurisdiction, the dividend payment at issue here does not fall within the *TD Securities* case. Finally, the Minister objects to the admission of much of the evidence relied upon by CGI.

[14] For the reasons that follow, I find that this Court has jurisdiction. I have concluded that the Minister acted reasonably. Further, I find that there was no breach of procedural fairness to CGI as it was aware at all times of the case to be met. Finally, CGI is not entitled to an order for *mandamus*.

III. Preliminary Issues

[15] There are two preliminary issues.

A. *Does this Court have jurisdiction?*

[16] The Minister argues that the actions of the CRA within the MAP process under the Treaty are not subject to judicial review because it is negotiations with another government and within the Crown's prerogative power over foreign affairs.

[17] I note that this Court has previously considered judicial reviews in the context of this Treaty, see generally: *Teletech Canada, Inc v Canada (National Revenue)*, 2013 FC 572; *Robert Julien Family Delaware Dynasty Trust v Canada (National Revenue)*, 2007 FC 1071.

[18] Furthermore, the decision of the Federal Court of Appeal [FCA] in *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2015 FCA 4 supports the finding that the administrative actions of the Minister even in the context of the MAP process are subject to review, provided the Court, in its supervisory role, shows appropriate deference to the role of the Minister and her prerogative powers over foreign affairs: *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 46, [*Khadr*].

[19] Subject to these limitations, I conclude that this Court has jurisdiction to consider the administrative actions of the CRA as the Minister's representative within the MAP process under the Treaty.

B. *Is the evidence of the applicant admissible?*

[20] The Minister challenges the admissibility of significant portions of CGI's Affidavit evidence.

[21] CGI relies upon two affidavits sworn by Richard Marcovitz, a tax partner with PricewaterhouseCoopers and an external tax advisor to CGI. The first affidavit, sworn on April 13, 2015, was filed in support of the Notice of Application.

[22] The second Marcovitz Affidavit, sworn on July 18, 2015, titled Reply Affidavit, was prepared in response to the Affidavit of Patrick Massicotte filed by the Minister. CGI was granted leave to file the Reply Affidavit pursuant to an Order of this court dated December 11, 2015.

[23] The Minister objects to paragraphs 9, 21, and 22 of the April Marcovitz Affidavit and objects to paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of the July Marcovitz Affidavit. The Minister states that these paragraphs should not be considered because they contain opinion, argument, and/or hearsay evidence.

[24] With regard to hearsay, the Minister relies on *Zheng v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1152 at para 5, and *Teva Canada Ltd v Pfizer Canada Inc*, 2016 FCA 161 at para 103, to support its position that hearsay evidence is only admissible if it is necessary and reliable. The Minister argues that neither of these conditions have been met by CGI.

[25] I will deal first with the Marcovitz Affidavit sworn on April 13, 2015. The last sentence of paragraph 9 of the affidavit is opinion and will be disregarded.

[26] Although paragraphs 21 and 22 address issues not directly before this Court, they do provide useful background information and context and are therefore acceptable (See: *Assn of*

Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22 at para 20 [*Assn of Universities*]).

[27] With respect to the Marcovitz Aiffidavit sworn on July 18, 2015, I agree with the Minister that paragraphs 2 and 3 contain opinion evidence and as such they will be disregarded.

[28] Paragraphs 4 and 5 of the July Marcovitz Affidavit contain hearsay evidence. Hearsay can be admissible if it is reliable and necessary. It is apparent from the evidence on record that the corporate reorganization which triggered the dividend payment was complex, in that it involved a number of entities across various jurisdictions. However that does not allow the Court to accept hearsay evidence when evidence could have been provided from someone with first-hand knowledge and/or involvement in the transactions. Accordingly, the information in these paragraphs is neither reliable nor necessary, and therefore will not be considered.

[29] The Minister also objects to paragraphs 6, 7, 8, and 9 of the July Marcovitz Affidavit on the basis that the source of the information outlined in those paragraphs has not been identified. Read in context, and considering the role Mr. Marcovitz has played with CGI and its predecessor corporations, I am satisfied that Mr. Marcovitz has the requisite personal knowledge to make the statements contained in these paragraphs and I will therefore allow these paragraphs to stand.

[30] The Minister also alleges that paragraph 11 of the July Marcovitz Affidavit contains opinion and argument which are not admissible. I disagree.

[31] The Minister objects to the documents provided by CGI in response to undertakings requested by the Minister. These documents are included in the Record, but are not attached to an Affidavit. These documents were not before the decision-maker. The role of the Court on

judicial review is generally limited to a consideration of the record that was before the decision-maker. This recognizes that the role of the Court on judicial review is to review the overall legality of what an administrative decision-maker has done. Judicial review is a forum to re-decide the matter on the merits, and it is not a fact-finding forum. Therefore, evidence that was not before the decision-maker will only be considered in exceptional circumstances: *Assn of Universities* at paras 18-20.

[32] The Federal Court of Appeal in *Assn of Universities* provided useful direction on the admissibility of evidence that was not before the decision-maker. Here, given the discrete issues before the decision-maker, I decline to exercise my discretion to admit these documents. To admit CGI's evidence for the purpose for which it is adduced on this application would effectively allow CGI to reargue its refund request under the Treaty. This Court would be stepping into the shoes of the Minister if it were to allow this evidence and assess whether the "factual assumptions" relied upon by the Minister were right or wrong. That is not the role of a Court on judicial review, therefore, these documents are not accepted into evidence.

IV. Analysis

[33] I have framed the issues to be determined on this application as follows:

A. Is there a reviewable decision by the Minister?

B. What is the standard of review and was it met?

C. Has there been a breach of CGI`s procedural fairness rights?

D. Is *mandamus* available as a remedy?

A. *Is there a reviewable decision by the Minister?*

[34] In this application, CGI seeks review of the position of the CRA that it is not entitled to a refund under the Treaty because the facts and circumstances of the CGI 2007 dividend payment are distinguishable from the *TD Securities* case.

[35] In *TD Securities*, the appellant (TD), a disregarded LLC, was taxed on its worldwide income in the United States through its member (para 96). The Tax Court concluded that an entity whose income was fully and comprehensively taxed in the other Contracting State is entitled to the benefits of the Treaty, even if the income is taxed at the level of the entity's shareholders, members, or partners (para 87). The Court in *TD Securities* noted that the decision did not stand for the proposition that every US LLC is entitled to Treaty benefits (para 104). For reasons discussed below, it is important to note that in *TD Securities*, there was no suggestion of tax avoidance or abuse on the part of TD (para 105).

[36] Following the release of the *TD Securities* decision, the CRA provided its administrative position (2010-0369271C6) regarding the taxation of US LLCs:

> The CRA continues to be of the view that an LLC that is fiscally transparent under the taxation laws of the United States is not a resident of the United States for the purposes of the Treaty. This is consistent with the view of the United States tax authorities, as is evident in paragraph 90 of [TD Securities]. However, in light of the decision, the CRA will provide relief under the Treaty to an LLC in the circumstances described below. Where relief is available, the CRA expects there will be corresponding adjustments to any foreign tax credits claimed in the United States that relate to the refunded Canadian taxes.

[37] The circumstances for obtaining relief under the Treaty were outlined as follows:

> Pre-Fifth Protocol (taxes withheld at source)
>
> Where an item of income that is subject to tax under Part XIII of the Act was paid or credited by a Canadian resident to an LLC prior to February 1, 2009, and a refund application is made before the expiration of the limitation period specified in subsection 227(6), the Minister will refund the excess tax if the item of income, in its entirety, was fully and comprehensively taxed in the United States in the hands of one or more persons who were residents of the United States under the treaty.

[38] Against this background, CGI made an application to the IRS in July 2013 to initiate the MAP process for tax relief under the Treaty. On November 4, 2013, the IRS wrote to the CRA to formally engage the MAP process.

[39] The record shows that on April 8, 2014, Mr. Massicotte of the CRA informed the IRS of Canada's position on CGI's request, and expressed concern that there appeared to be a tax avoidance scheme with the CGI corporate reorganization which gave rise to the dividend payment. The IRS official confirmed that the dividend was not fully and comprehensively taxed in the United States, and the official was unable to explain why the NSULC was interposed between CGI and a related company in Mexico. The IRS official advised that he would try to find an explanation. However, it appears from the record that no explanation was provided to the CRA by the IRS.

[40] On May 12, 2014, CGI provided additional submissions to the CRA. Between June 26, 2014, and October 14, 2014, discussions took place between the CRA and the IRS. Mr. Massicotte advised the IRS that CRA's position had not changed, and it viewed the CGI situation as different from the situation in *TD Securities* because the dividend was not fully and

comprehensively taxed in the US and there was no business purpose for the existence of the NSULC.

[41] In a letter dated November 14, 2014, the CRA advised the IRS that the case was concluded, stating as follows:

> In reply to your letter of November 4, 2013, in which you requested that Canada issue a refund of CAN $28,463,184 for taxes withheld in 2007 in connection with a dividend paid to CH LLC [CGI] by a Nova Scotia unlimited liability company (NSULC). The refund requested is the amount withheld in excess of the maximum amount that, in your view, was chargeable under Article X(2)(a) of the Canada U.S. Tax Convention (1980).
>
> . . .We have reviewed the circumstances of this case and regret that we cannot for the reasons explained below, issue the refund of tax requested.

[42] CGI was informed of this decision on January 8, 2015, during a telephone conversation between Mr. Massicote of the CRA and Mr. Marcovitz on behalf of CGI. On February 13, 2015, the IRS advised CGI that the two Competent Authorities were unable to resolve the issue under the MAP process, and that the case was closed.

[43] Although CGI did not receive a letter directly from the CRA denying their refund, it is clear from the November 14, 2014 CRA letter that the CRA made a decision, and that decision brought the MAP process to an end without any tax relief for CGI.

[44] Contrary to the position taken by the Respondent, I conclude that there was a “decision” by the CRA acting on behalf of the Minister and that decision properly forms the foundation of this judicial review application.

B. *What is the Standard of review and was it met?*

[45] CGI submits that the standard of review to be applied to the Minister's decision is correctness, as the errors are questions of law and relies upon the following authorities: *Sheldon Inwentash and Lynn Factor Charitable Foundation v Canada*, 2012 FCA 136 at para 23; *Clover International Properties (L) Ltd v Canada (Attorney General)*, 2013 FC 676 at paras 15-18.

[46] Findings relating to the corporate structure of CGI and whether the 2007 dividend was fully and comprehensively taxed in the United States require particular findings of fact. The standard of review for findings of fact is reasonableness. Likewise any discretionary decision-making of the Minister is also reviewed on a reasonableness standard: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

[47] Furthermore, the language of the Treaty itself supports the finding that reasonableness is the appropriate standard of review. The Treaty states: "the competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention" (Art. XXVI (3)).

[48] A further consideration is the broad margin of appreciation afforded to the Minister in the context of the MAP process. The Court owes deference to the "range of considerations" underlying the government-to-government negotiations: see *Khadr*, at para 46.

[49] In these particular circumstances on a reasonableness standard of review, the margin of appreciation owed to the Minister is very broad: (*Canada (Attorney General) v Boogaard*, 2015 FCA 150 at para 64).

[50] Accordingly, I conclude that reasonableness is the appropriate standard of review. Therefore, the Court will only intervene if it can be demonstrated that the decision falls outside the range of possible, acceptable outcomes defensible in respect of the facts and the law: *Dunsmuir*, at para 47.

[51] Here, the CRA determined that the facts and circumstances giving rise to the CGI dividend were not aligned to those in the *TD Securities* case. It concluded that tax avoidance may have been a factor in the corporate reorganization. Further, the CRA was not satisfied that the dividend was fully and comprehensively taxed in the United States. These factors are addressed in the *TD Securities* decision. Therefore, it cannot be said that the CRA reached its conclusion without considering the information provided by CGI and consultations with the IRS. These conclusions are within the range of possible outcomes of the MAP process. I therefore find that the CRA acted reasonably and that CGI has failed to demonstrate a reviewable error.

C. *Has there been a breach of CGI`s procedural fairness rights?*

[52] In its written and oral submissions, CGI argues that there was a breach of their procedural fairness rights. It states that it had no notice of the CRA's concerns that the 2007 dividend was not fully and comprehensively taxed in the US and that there was no valid business purpose to the corporate structure.

[53] The Minister argues that since CGI did not plead breach of procedural fairness in the Notice of Application, it cannot now raise the argument. For its part, CGI says it only learned of these concerns on the part of the CRA after it received the Minister's Affidavit and its attachments.

[54] Normally, the Court will not consider grounds of review that have not been included in the Notice of Application (See: *Vézina v Canada (Defence)*, 2012 FC 625 at para 21, and *Campos Shimokawa v Canada (Minister of Citizenship and Immigration)*, 2006 FC 445 at para 31).

[55] CGI did not plead breach of procedural fairness in its Notice of Application. However, considering that CGI did not have direct participation in the MAP process and negotiations, I have decided to exercise my discretion and consider CGI's submissions on the procedural fairness issue.

[56] The extent of the duty of procedural fairness owed to a party varies with the context and is determined by considering the totality of the circumstances of the decision at issue. Courts are guided by the non-exhaustive set of factors identified by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 23-28.

[57] Pursuant to the *Baker* factors, I am satisfied that the CRA was obligated to deal fairly with CGI and to consider its submissions.

[58] CGI argues that since it was not party to the discussions between the CRA and the IRS, it was unaware of the CRA's concerns that the 2007 dividend was not fully and comprehensively taxed in the US and that there was no valid business purpose to the corporate structure.

[59] This position however is not supported by the evidence on the record. The basis for CGI's application for a refund was the *TD Securities* decision. A review of that decision shows that the issues of full taxation and tax avoidance are specifically addressed by the Court in its decision (see para 87-105). Further, the record shows that the CRA put CGI on notice of its

position that *TD Securities* was distinguishable. Accordingly, I conclude that CGI had notice of the CRA's concerns.

[60] In addition to having notice of these concerns, CGI was afforded the opportunity to provide further submissions to the CRA. In its submissions of May 12, 2014, CGI specifically referenced the issue of taxation of the 2007 dividend and also specifically referenced the CRA's treatment of avoidance structures in these submissions.

[61] CGI was aware that the issues of full taxation and tax avoidance were concerns for the CRA, and it was afforded the opportunity to address these issues in writing during the MAP process. For these reasons, I find that CGI was aware of the CRA's concerns and was given an opportunity to respond. As a result, I conclude there has been no breach of procedural fairness in this case.

D. *Is mandamus available as a remedy?*

[62] As an alternative to judicial review, CGI seeks an order for *mandamus* pursuant to subsection 227(7) or 227(10.1) of the *ITA* and asks that that the Minister be ordered to issue a notice of assessment.

[63] Subsection 227(7) of the *ITA* requires the Minister to issue a Notice of Assessment when it rejects a subsection 227(6) application. However, subsection 227(6) applies only where the taxpayer applies within two years after the end of the calendar year in which the tax was paid. It therefore does not apply to the facts of this case since CGI's refund request was well past two years. Parliament has imposed a two-year time limit for applications under subsection 227(6).

To grant the requested relief under subsection 227(7) would allow CGI to circumvent the intention of Parliament.

[64] In the alternative, CGI relies on subsection 227(10.1). This provision gives the Minister discretion and states that the Minister "may" assess at any time.

[65] In *Canada (Attorney General) v Abraham*, 2012 FCA 266, [*Abraham*] the FCA considered a similar discretionary provision of the ITA which provided that the Minister "may" reassess tax on application by the taxpayer. In *Abraham* the Court concluded that this provision did not confer a statutory right to an assessment.

[66] Applying the reasoning in *Abraham*, CGI has, at most, the right to ask the Minister to exercise her discretion to assess under subsection 227(10.1). The Minister must then decide whether or not to exercise the discretion provided under this provision.

[67] Here however, CGI has not demonstrated a refusal on the part of the Minister to exercise her discretion. The letter requesting an assessment under the *ITA* is dated March 5, 2015. CGI then filed its Notice of Application for Judicial Review on March 13, 2015, only a few days after the request for an assessment. In the circumstances, CGI did not provide the Minister with a reasonable period of time to consider the assessment request.

[68] CGI has not established a statutory right to an assessment pursuant to Subsection 227(7) or (10.1) of the *ITA* that can be enforced by a writ of *mandamus*. Furthermore, given the short period of time between the request for an assessment and the filing of the present Application, CGI has not shown unreasonable delay or refusal to act on the part of the Minister. CGI is not entitled to an order for *mandamus*.

V. Conclusion

[69] For the reasons outlined above, this judicial review is dismissed. CGI has not established any breach of procedural fairness and the decision of Minister, acting through the CRA, was reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review is dismissed; and

2. Costs are awarded to the respondent.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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