

Federal Court



Cour fédérale

Date: 20180302

Docket: T-1148-17

Citation: 2018 FC 244

Vancouver, British Columbia, March 2, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

GERALD MADORE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant is challenging a decision by an Appeals Officer (the officer) of the Canada Revenue Agency (CRA), communicated by letter dated July 12, 2017, to request that a payroll audit be completed for IBM Canada before deciding whether to allow or disallow the Applicant's objection for the 2014 tax year. In his Notice of Application for judicial review pursuant to s 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, the Applicant describes this as a

decision by the CRA to refuse to refund an overpayment made to his income tax account in the amount of \$205,469.25.

[2] As stated in the July 12, 2017 letter, the officer decided that a payroll audit was required before making a final determination on the Applicant's request pursuant to s 164(1)(b) of the *Income Tax Act*, RSC 1985, c 1 (5th supplement) [*ITA*], because a preliminary review had determined that there was an issue with an amended T4 issued to the Applicant for the 2014 taxation year.

[3] For the reasons that follow, I conclude that the application is premature and must be dismissed pending the completion of the ongoing administrative process.

II. Background

[4] The Applicant, Gerald Madore, is a non-resident of Canada and has reported employment income from IBM Canada Ltd. (IBM) since 2011. IBM issued previous T4 slips for the Applicant in tax years 2011-2013 in amounts varying from \$99,614 to \$378,245.

[5] On or about February 25, 2015, IBM issued a T4 for the Applicant's 2014 taxation year. The T4 indicated employment income of \$553,480 and income tax deducted of \$205,469.25. IBM then issued an amended T4, at his request, on or about June 17, 2015, for the Applicant's 2014 taxation year. The amended T4 changed the employment income from \$553,480 to \$923. The income tax deducted remained the same at \$205,469.25. Mr. Madore's affidavit states that

he had contacted IBM to have them correct the T4 as he had not been paid \$553,480 in 2014 by IBM.

[6] On April 5, 2016, the CRA assessed the Applicant's 2014 taxation year and reduced to nil both the employment income of \$923 and the income tax deduction of \$205,469 since the CRA was not able to verify the amended T4. The Applicant's 2014 taxation year was not reassessed.

[7] On May 30, 2016, the Applicant filed a Notice of Objection regarding the assessment. The officer received two letters from IBM confirming that the amended T4 is valid and that the income on the original T4 was overstated. However, the officer had concerns with the amended T4. As withholding taxes represent a percentage of employment income paid, the officer found it problematic that the amended T4 reflected \$205,469.25 of income tax deducted on \$923 of income.

[8] The officer attempted to verify the amounts on the amended T4 and inquired as to why taxes in the amount of \$205,469.25 would have been withheld on an income of \$923. Counsel for the Applicant and counsel for IBM advised the officer that the Applicant earned \$923 from IBM in 2014 but neither were able to explain why the amended T4 would reflect withheld taxes of \$205,469.25.

[9] On May 12, 2017, the Applicant filed a request for a refund of tax paid in the amount of \$205,469.25 pursuant to s 164(1)(b) of the ITA. Section 164(1)(b) of the ITA states that the

Minister shall, with all due dispatch, refund the taxpayer any overpayment that is owed. The Applicant sought the refund of the amount that the amended T4 indicated had been remitted by IBM to the CRA for the Applicant's 2014 taxation year.

[10] In the letter dated July 12, 2017, the officer indicated that she was unable to determine if his employment income was correctly reported and that a payroll audit needed to be complete before a decision can be made. The letter, with personal details redacted, reads as follows:

Dear Mr. Madore

Re: Income Tax Objections for the 2014 taxation year

Our File #s: [...]

Accounts: [...]

As per a conversation with your authorized representative, this letter is to update you on the status of your objection for the 2014 tax year.

During a preliminary review of your objection for the 2014 tax year, it has been determined that there is an issue with your amended T4 slip issued by IBM Canada. Due to the fact that we cannot determine if your employment income was calculated and reported correctly, specifically in regards to the actual taxable compensation and both the appropriate and actual deductions withheld at source we have requested a payroll audit be completed for IBM Canada. Once the payroll audit has been completed we will then make a decision to allow or disallow your objection based on the results.

Regards,

[...]

[11] The Applicant seeks a declaration that the CRA erred, an order of *mandamus* for the release of the funds, and costs, including public interest costs.

III. Issues

[12] The Applicant submits that the issue for consideration is whether the Minister responsible for the CRA breached her statutory obligations by refusing to return the \$205,469.25 upon application pursuant to s 164(1) of the *ITA*.

[13] The Respondent submits the following issues for consideration:

- A. Whether the application is premature;
- B. Whether the Minister properly refused to pay the amount to the Applicant prior to the determination of whether any party is entitled to any refund to section 164 of the Act; and
- C. Whether the Applicant's request for relief in the form of mandamus is premature.

[14] Having considered the record and the parties' written and oral submissions, in my view the only issue which the Court must determine is whether the application for judicial review is premature.

IV. Standard of review

[15] The Applicant submits that the standard of review is correctness as it relates to the interpretation of the *ITA*: *Imperial Oil Resources Ltd v Canada (AG)*, 2016 FCA 139 at paras 47, 48 [*Imperial Oil*]. In the alternative, the Applicant submits that the standard of review is

reasonableness but within a relatively narrow range: *Canada (AG) v Canadian Human Rights Commission*, 2013 FCA 75 at paras 14-15.

[16] The Respondent submits that this Court must proceed to an analysis of the factors making it possible to identify the proper standard of review since case law has not already determined in a satisfactory manner the degree of deference to be accorded: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 62 [*Dunsmuir*]. The Respondent notes that a privative clause, the discretion and the special administrative regime, and the nature of the question of law are factors that lead to the reasonableness standard: *Dunsmuir*, at para 55. The questions of fact and mixed fact and law should also be reviewed on a standard of reasonableness.

[17] As I have determined that this application turns on the question of whether it is premature or not, I do not believe that it is necessary for me to conduct a standard of review analysis.

V. Relevant legislation

[18] The relevant provisions of the ITA read as follows:

Refunds

164 (1) If the return of a taxpayer's income for a taxation year has been made within 3 years from the end of the year, the Minister

[...]

(b) shall, with all due dispatch, make the refund referred to in subparagraph (a)(iii) after sending the notice of assessment if application for it is made in writing by the taxpayer within the period within which the

Remboursement

164 (1) Si la déclaration de revenu d'un contribuable pour une année d'imposition est produite dans les trois ans suivant la fin de l'année, le ministre :

[...]

b) doit effectuer le remboursement visé au sous-alinéa a)(iii) avec diligence après avoir envoyé l'avis de cotisation, si le contribuable en fait la demande par écrit au cours de la période pendant laquelle le

Minister would be allowed under subsection 152(4) to assess tax payable under this Part by the taxpayer for the year if that subsection were read without reference to paragraph 152(4)(a).

ministre pourrait établir, aux termes du paragraphe 152(4), une cotisation concernant l'impôt payable en vertu de la présente partie par le contribuable pour l'année si ce paragraphe s'appliquait compte non tenu de son alinéa a).

VI. Analysis

A. *Is the application for judicial review premature?*

[19] The Respondent submits that this application for judicial review is premature and that this Court should not interfere with the ongoing administrative process until it is completed, absent exceptional circumstances: *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 at paras 30-33 [*Powell*]; *Canada (MNR) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 84, 85 and 86.

[20] In the circumstances, the Respondent argues, the Minister has not been able to make a factual determination on the Applicant's entitlement to the refund and awaits the conclusion of an audit of IBM's payroll account. The Minister has declined to pay the amount to anyone until a final decision has been reached on this matter.

[21] The Applicant has implicitly conceded that the July 12, 2017 letter is not a final decision. At paragraph 3 of his Notice of Application, he states that this "represents an ongoing state of affairs" and that the statute of limitations does not apply pursuant to s 18(2) of the *Federal*

Courts Act since the time period will not run until the money is paid. In addition, at paragraph 13 of his affidavit, he indicated the following:

I received a letter from the CRA dated July 12, 2017, indicating that the CRA has requested a payroll audit be completed for IBM Canada and that a decision as to my file will not be made until the CRA has completed that audit, a true copy of this document is attached hereto and marked as Exhibit "H". On information and belief, I understand this letter to mean I will not get a refund of the amount over withheld by IBM until the payroll audit of IBM Canada is complete.

[Emphasis added]

[22] The Applicant's primary concern appears to be that he does not want to wait until the audit is completed. This is indicated by his counsel's letter dated May 12, 2017 to the CRA, in which it is stated that they are making the request pursuant to s 164(1) of the *ITA* since "it will take a substantial amount of time for [the officer] to review the Taxpayer's file as it will require a complete trust audit of [IBM]. Given the resulting delay, we are filing this request to have the overpayment returned to the Taxpayer forthwith."

[23] It is possible, the Respondent concedes, that IBM remitted too much on the Applicant's behalf. But it is also possible that the funds were never deducted or withheld from the Applicant's income. That is a matter between CRA and IBM the Applicant argues, and should not prevent the return of the tax which the amended T4 says was withheld on his behalf upon his written request. IBM mistakenly withheld the amount from the Applicant's worldwide income, the Applicant argues.

[24] Without an audit, the Respondent submits, the Minister is unable to make a factual determination that there was in fact an overpayment of \$205,469 in taxes by the Applicant and carefully exercise its statutory obligations under s 164(1)(b) of the ITA. The claim that the money was mistakenly withheld by IBM from the Applicant's world-wide income was not before the officer and there is no conclusive evidence that IBM in fact withheld the amount claimed from the Applicant's income.

[25] Had I thought it necessary to conduct a standard of review analysis, I would have concluded that the officer's decision to request an audit and not refund the purportedly overpaid tax amount is both reasonable and correct. It is clear from the officer's notes to file that form part of the record before the Court that she believed that she was not receiving straight answers to the legitimate questions she posed to the Applicant. The audit should provide those answers.

[26] The officer must act with "due dispatch" and has done so. The officer must exercise due diligence and the audit is necessary to determine who is entitled to the refund amount; the amount could have been deducted from the Applicant's worldwide income, or it could have been remitted and paid by IBM in error. The request for the refund was filed May 12, 2017, and the Minister advised the Applicant on June 12, 2017, that they must complete further investigations before the money can be paid out – roughly 2 months afterwards.

[27] I agree with the Respondent that the judicial review is premature. The delay associated with completing an audit is not an exceptional circumstance that would require this Court to interfere with the Minister's ongoing administrative process: *Powell*, above at para 33. The letter

dated July 12, 2017, is not a final decision; it clearly indicates that a decision is pending the outcome of a final investigation. While the Applicant may not be pleased with the decision to audit IBM, this application for judicial review of that decision is premature. For that reason, it will be dismissed.

VII. Costs

[28] The Respondent has requested that a total amount of \$2,300 be awarded: \$1,600 under Tariff B, Column 3 and \$700 for disbursements. Those amounts appear to be reasonable subject to the filing of an itemized list of disbursements.

JUDGMENT in T-1148-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and
2. The Respondent is awarded costs in the amount of \$1,600 under Tariff B and \$700 for disbursements subject to the filing of an itemized list.

“Richard G. Mosley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1148-17

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APPEARANCES:

Drew Gilmour FOR THE APPLICANT

Selina Sit FOR THE RESPONDENT

SOLICITORS OF RECORD:

Schmidt & Gilmour Tax Law LLP FOR THE APPLICANT
Vancouver, British Columbia

Attorney General of Canada FOR THE RESPONDENT
Vancouver, British Columbia