Federal Court Cour fédérale

Date: 20221212

Docket: T-576-20

Citation: 2022 FC 1704

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 12, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

SÉBASTIEN ROY

Applicant

and

MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Sébastien Roy, a chartered professional accountant, is seeking judicial review of a decision of the Minister of National Revenue [Minister], dated March 6, 2020, by which a representative of the Minister refused to allow Mr. Roy's request for a correction to line 121 of his 2009 income tax return to reflect $488,981 in interest and other investment income.

[2] Mr. Roy submits that the Minister's representative erred in limiting her decision to the analysis and application of sections 38 to 40 of the *Income Tax Act*, RSC 1985, c. I (5th Supp) [Act], which concern the period during which he could request a deduction for capital losses resulting from the disposition of capital property, and that she should instead have applied the rules in terms of encashment and carryover of capital losses to his situation. Mr. Roy alleges that he submitted this argument in due form to the Minister's representative and claims that by not considering it, she rendered an unreasonable decision.

[3] For the reasons that follow, I am not convinced that the decision of the Minister's representative is unreasonable and, consequently, the present application for judicial review will be dismissed.

II. Background

[4] In 2008 and 2009, Mr. Roy conducted a large number of transactions in his brokerage account with National Bank Direct Brokerage Inc. [NBDB]. For 2008 and 2009, NBDB issued slips to the Canada Revenue Agency [CRA] noting Mr. Roy's securities transactions [T5008 slips] for all of these transactions, which must comply with the applicable legislation and regulations.

[5] Moreover, as of April 2015, Mr. Roy had still not filed his tax returns for 2008 and 2009, as well as for 2010, 2012, 2013 and 2014. When a taxpayer has not filed an income tax return for a given year, and the CRA receives T5008 slips in his or her name, the CRA's policy is to make an identifying assessment by multiplying the total proceeds of disposition on the T5008 slips by

a certain percentage, which is determined based on the stock market return for the year in question. The resulting amount will be taxed by CRA at 50% as a capital gain. The reason for this calculation is that the T5008 slips issued in the taxpayer's name to the CRA do not state the acquisition cost of the shares, but only the proceeds of their disposition, forcing the CRA to conduct an estimate of the capital gain actually earned by the defaulting taxpayer.

[6] Thus, on April 17, 2015, a notice of estimated tax assessment was issued by an officer in the CRA's Non-Filer Section under subsection 152(7) of the Act to Mr. Roy for the year 2008. Mr. Roy's total income was set at $589,645, resulting in a balance payable of $184,794.83. The assessment was made by attributing to Mr. Roy a capital gain representing 20% of all proceeds of disposition of securities traded by him in 2008 for an amount of $967,806, which was taxable at 50% for an amount of $483,903. On May 26, 2015, a notice of estimated tax assessment was also issued for 2009, identifying Mr. Roy's total income at $141,798 and resulting in a balance payable of $12,092.

[7] Mr. Roy did not exercise his legal right to object to the assessments of May 17 and May 26, 2015, within 90 days of the mailing of the assessments, in accordance with subsection 165(1) of the Act, nor did he request an extension of the timeline to object to the assessments under section 166.1 of the Act, alleging that he did not receive a copy of the notices of assessment.

[8] On August 18 and August 27, 2015, a collections officer contacted Mr. Roy's office to invite him to file his tax returns for the years 2008 to 2010 and 2012 to 2014. On

August 31, 2015, following Mr. Roy's lack of response, the collections officer initiated collection proceedings on his property to collect the tax debt created by the estimated assessments and, on that same day, contacted Mr. Roy again to request that he file his tax returns for the years for which he was in default. During this conversation, Mr. Roy assured the collection officer that his returns would be filed with CRA by September 30, 2015. He made the same promise to the collections officer on April 6, 2016, August 29, 2016, and September 22, 2016.

[9] On August 12, 2019, some three years after he undertaken to do so, Mr. Roy filed his tax returns for the years 2008 to 2010 and 2012 to 2014. For the years 2008 and 2009, Mr. Roy reported total income of $105,742 and $79,474 respectively. On December 12, 2012, the CRA sent a letter to Mr. Roy's attention, notifying him that he was precluded from requesting an adjustment to his 2008 tax return, since his August 12, 2019, request had been filed after the ten-calendar-year timeline set out in the taxpayer relief provisions of the Act. On December 13, 2012, the CRA sent Mr. Roy his notice of assessment for 2008, which confirmed the estimated assessment notice issued by the Non-Filer Section officer in 2015.

[10] On December 27, 2019, Mr. Roy sent the CRA a T1 Adjustment and Carry-back request in which he sought a deduction from his 2009 income of $488,981 on line 121 of his return, which corresponds to "Interest and other investment income". In an explanatory letter attached to his request, Mr. Roy mentioned the following:

> [TRANSLATION]
>
> Investment income of $483,903 was assessed by Revenue Canada in 2008…based on Revenue Canada's erroneous analysis of National Bank Brokerage's T5008. Considering the capital loss of

> $10,157 at 50%, i.e. $5,078, there is a difference in uncashed income of $488,981 . . .
>
> Investment income is taxable on a cash basis, and an analysis of the brokerage accounts for 2008 and 2009 shows no cashing-in of this income . . .
>
> Since the investment income of $488,981 contributed in 2008 is the result of an error in analysis, was not contributed on a cash basis and was not cashed in either in 2008 or 2009 (possibility of T+3 days payment if transaction had taken place at the end of 2008), the taxpayer notes a loss of investment income not cashed in in 2009.

[11] On February 26, 2020, Mr. Roy and the Minister's representative had a telephone conversation during which the latter explained to Mr. Roy that the ten-year timeline provided in subsection 152(4.2) of the Act for amending his 2008 income tax return had expired, and that he could not request a capital loss deduction of $483,903 for 2009 since he had not disposed of any assets that would create such a capital loss, in accordance with sections 38 to 40 of the Act.

[12] On March 6, 2020, the Minister's representative denied Mr. Roy's adjustment request for 2009, stating the following:

> [TRANSLATION]
>
> In addition, no correction will be made to line 121 "Interest and other investment income" since you cannot deduct an interest loss.

[13] For the purposes of her decision, the Minister's representative considered the following elements:

(a) a capital loss is incurred in the year of disposition of the assets;

(b) the Minister can no longer assess the 2008 taxation year in 2019, since the ten-year timeline for doing so provided for in subsection 152(4.2) of the Act has elapsed;

(c) the applicant cannot report a loss on line 121 (interest and other investment income) of his 2009 income tax return in respect of interest and other investment income;

(d) CRA's Supplementary Examination Section, at the time of the audit, indicated to the Minister's representative that, in order for a capital loss to be reported, there must have been a disposition of assets in the year;

(e) the CRA's Supplementary Examination Section also indicated that the loss initially reported by the applicant on line 121 could not be entered on this line and to state this in the decision letter of March 6, 2020;

(f) the Act does not allow a capital loss to be reported in a year other than the year of disposition of the asset or property.

[14] It is that decision that is the subject of the present application.

III. Issue and standard of review

[15] The present application for judicial review raises a single issue: was the Minister's representative's decision reasonable?

[16] The standard of review applicable to the Minister's representative's decision is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17 [*Vavilov*]). The Court's role is therefore to determine whether the decision as a whole was reasonable, that is, whether it was based on "an internally coherent and rational chain

of analysis" and whether the decision as a whole was transparent, intelligible and justified (*Vavilov* at paras 85–86).

IV. Preliminary issue

[17] It is worth noting that Mr. Roy alleges, in his written submissions, that on March 25, 2020, he sent a letter asking that his request for adjustment for 2009 be considered a capital loss rather than a loss of interest and other investment income, accompanied by a request for an adjustment of a T1 amending Schedule 3 of his income tax return. The Minister, the respondent in this case, pointed out that these were facts that were not submitted to her prior to the decision at issue and that they should not be taken into consideration by the Court.

[18] In my view, the issue of whether it was possible for Mr. Roy, under the Act, to request a capital loss deduction for 2008 for 2009 is at the heart of the present dispute, as demonstrated by the scope of the arguments submitted by the parties to this effect. Given that the Minister's representative did not contest having considered this possibility and having discussed it with Mr. Roy as part of her decision-making process, that she alleged in her affidavit that on March 25, 2020, Mr. Roy again requested an adjustment from the CRA in order to report a capital loss in 2009 and to carry it forward against the capital gain established by the CRA and for which Mr. Roy is now required to file an amended income tax return, and that the parties have had an opportunity to present their arguments on the matter, I find that the letter sent by Mr. Roy dated March 25, 2020, adds nothing more to the debate. Accordingly, it will not be considered as part of the present analysis.

[19] At the hearing, during the cross-examination on affidavit of Mr. Michael Morgan, the Non-Filer Section officer involved in Mr. Roy's file, Mr. Roy's counsel also challenged the admissibility of two commitments made by the Minister's counsel, which had been placed in the Minister's record without being submitted by affidavit. Mr. Roy's counsel argued that, since each party was master of its own evidence, it was up to him to make the choice as to whether or not to produce these commitments, and that under sections 307 to 309 of the *Federal Courts Rules*, SOR/98-106 [Rules], the Minister was not permitted to act as she did.

[20] It should first be pointed out that making commitments in the context of cross-examination on affidavits is an unusual practice, to say the least, and is not in itself provided for in the Rules. Moreover, the commitment at issue here happens to contain the T5008 documents allegedly sent by NBDB to the CRA in 2008, on the basis of which the Non-Filer Section officer allegedly found the capital gain that led to the notices of estimated tax assessment received by Mr. Roy in 2015 to be $483,903. A version of the T5008s is also in Mr. Roy's record, and the fundamental difference between the two versions would be that the T5008s sent to CRA contained only the proceeds of disposition of the securities, while those submitted by Mr. Roy contained a debit and credit column for each security, which underlies the possibility of calculating the capital gain or loss with certainty without having to rely on the estimate conducted by the officer.

[21] However, I note, on the one hand, that Mr. Roy does not contest that he is precluded from amending his tax return for 2008 and that the notice of assessment for 2008, which confirms the amounts of the notice of estimated assessment issued in 2015, is therefore valid in every respect.

On the other hand, Mr. Roy's submissions before the Court, to the effect that the CRA had before it all the information it needed to calculate the exact amount of the capital gain resulting from the sale of his shares in 2008, are in clear contradiction with the Minister's comments and the statements contained in Mr. Morgan's affidavit, which was otherwise filed in full compliance with the Rules, to the effect that the T5008s sent to the CRA reported only the proceeds of disposition. Consequently, since the notice of assessment for 2008 is not at issue, and in order to shed light on the contradiction set out above, it will suffice for the purposes of this application to conclude that the officer conducted his calculations on the basis of the information before him, namely the proceeds of disposition of the shares resulting from Mr. Roy's stock market transactions for 2008.

V. Analysis

[22] Subsection 152(4.2) of the Act allows the Minister to extend to ten years the period during which she may review a taxpayer's assessment. To do so, the taxpayer must demonstrate that he or she is eligible for a reimbursement or reduction of an amount payable for the year. The subsection reads as follows:

152(4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining, at any time after the end of the normal reassessment period of a taxpayer who is an individual (other than a trust) or a testamentary trust in respect of a taxation year, the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount	152(4.2) Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable — particulier (sauf une fiducie) ou succession assujettie à l'imposition à taux progressifs — pour une année d'imposition, le remboursement auquel le contribuable a droit à ce

payable under this Part by the taxpayer for the year, the Minister may, if the taxpayer makes an application for that determination on or before the day that is ten calendar years after the end of that taxation year …	moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année en vertu de la présente partie, le ministre peut, si le contribuable demande pareille détermination au plus tard le jour qui suit de dix années civiles la fin de cette année d'imposition, à la fois : […]

[23] Sections 38 to 40 of the Act specify that a capital loss is incurred by a taxpayer in the year in which the taxpayer disposes of a property at a loss. More specifically, paragraphs 38(1)(b), 39(1)(b) and 40(1)(b) of the Act state that a taxpayer must dispose of a property in a given year in order to request a capital loss deduction in respect of the disposition of this property:

38(1)(b) <u>a taxpayer's allowable capital loss</u> for a taxation year from the disposition of any property is ½ of the taxpayer's capital loss <u>for the year</u> from the disposition of that property;	38(1)b) <u>la perte en capital déductible d'un contribuable</u>, pour une année d'imposition, résultant de la disposition d'un bien est égale à la moitié de la perte en capital que le contribuable a subie, <u>pour l'année</u>, à la disposition du bien;
…	[…]
39(1)(b) a taxpayer's capital loss for a taxation year from the disposition of any property <u>is the taxpayer's loss for the year … from the disposition of any property of the taxpayer</u>…	39(1)b) une perte en capital subie par un contribuable, pour une année d'imposition, du fait de la disposition d'un bien quelconque <u>est la perte qu'il a subie au cours de l'année, […] du fait de la disposition d'un bien quelconque de ce contribuable</u> […]
…	[…]

40(1)(b) a taxpayer's loss for a taxation year from the disposition of any property is,	40(1)b) la perte d'un contribuable résultant, pour une année d'imposition, de la disposition d'un bien est :
(i) if the property was disposed of in the year, the amount, if any, by which the total of the adjusted cost base to the taxpayer of the property immediately before the disposition and any outlays and expenses to the extent that they were made or incurred by the taxpayer for the purpose of making the disposition, exceeds the taxpayer's proceeds of disposition of the property, and	(i) en cas de disposition du bien au cours de l'année, l'excédent éventuel du total du prix de base rajusté du bien, pour le contribuable, immédiatement avant la disposition, et des dépenses dans la mesure où celles-ci ont été engagées ou effectuées par lui en vue de réaliser la disposition sur le produit de disposition du bien qu'il en a tiré,
(ii) in any other case, nil.	(ii) dans les autres cas, nulle.
[Emphasis added.]	[Je souligne.]

[24] As the Court previously noted, Mr. Roy does not dispute that he is no longer able to amend his 2008 tax return. Rather, he submits that the Minister's representative had the authority to amend his capital loss balance for 2009 and apply that loss retrospectively to 2008. Referring to the Act, he notes that paragraph 39(1)(a) of the Act provides that a taxpayer's capital gain from the disposition of any property for a taxation year is the taxpayer's gain for the year from the disposition of property owned by the taxpayer, and that paragraph 111(1)(b) of the Act provides that a taxpayer may carry back net capital losses indefinitely. He also points out that a not cashed in or uncollectible amount in a capital transaction constitutes a capital loss.

[25] Mr. Roy further submits that the estimate made by the Non-Filer Section officer in 2015 generated a fictitious not cashed in taxable capital gain of $483,903 for the year 2008. Mr. Roy maintains that, using the estimated premises of his 2008 assessment, he therefore had an accrued

receivable, a capital asset. He alleges that this receivable in the amount of $967,903 was not cashed in either in 2008, when his NBDB account balance was $33,570, or in 2009, when his account balance was $18,654, with a negative variation in his cash balance.

[26] Mr. Roy submits that, when it became clear in 2009 that the amounts would never be cashed in, he was therefore justified in requesting a capital loss deduction. He argues that this capital loss was triggered in 2009, since under the encashment regulations, which Mr. Roy refers to as the “T+3” rule, the non-collection of the capital gain at the end of 2008 did not materialize until three days later, in early January 2009. Under paragraph 111(1)(b) of the Act, this loss could therefore be legally carried back against his capital gain for 2008. Mr. Roy argues that the Minister’s representative was not bound by the rule set out in subsection 152(4.2) of the Act and that, under the loss carry-forward rules, she had the authority to amend his capital loss balance for 2009 and his capital gain balance for 2008, without issuing a notice of assessment. Mr. Roy submits that by failing to consider this possibility, the Minister’s representative rendered an unreasonable decision.

[27] I cannot agree with Mr. Roy’s arguments, for two reasons. First, Mr. Roy has not convinced me that the argument he made before me was presented to the Minister’s representative in a way that allowed her to grasp its meaning, and thus to take it into account in the analysis that led her to make her decision dated March 6, 2020. On the one hand, the adjustment request sent by Mr. Roy on December 27, 2019, to the CRA for 2009 was not for a capital loss deduction, but for a loss of investment income. It is this request that the March 6, 2020, decision rejects, on the grounds that the Act does not allow the deduction of an

interest loss. On the other hand, I am of the view that the explanations contained in the letter attached by Mr. Roy, the gist of which has been reproduced above, in addition to perpetuating the confusion between capital loss and loss of investment income, are insufficient to explain Mr. Roy's position clearly and satisfactorily.

[28] I note, moreover, that the Minister's representative noticed this apparent confusion and then, on her own initiative, made inquiries of the CRA's Supplementary Examination Section at the time of the audit, in order to validate the rules surrounding the reporting of a capital loss. The Minister's representative subsequently provided Mr. Roy with additional explanations to this effect during their telephone conversation on February 26, 2020, namely that the Act does not allow a capital loss to be reported for a year other than the year of disposition of the asset or property. However, it was only after receiving the March 6, 2020, decision that Mr. Roy requested, on March 25, 2020, a further adjustment from CRA in order to report the loss as a capital gain. It was on this day, therefore, that he first formulated the argument as it was presented to me. Consequently, I can hardly blame the Minister's representative for not having considered an argument that had not been properly submitted to her.

[29] Second, after hearing the submissions of Mr. Roy's counsel at the hearing and considering the argument in its final form, I am not convinced that it has any basis whatsoever to provide any doubt as to the reasonableness of the impugned decision. Indeed, I asked Mr. Roy's counsel several times to confirm that the capital loss deduction applied for in 2009 could be considered real, given the fictitious nature of the capital gain assessed for 2008. The latter maintained that the loss was real, since the gains had not been cashed in by Mr. Roy in 2009.

However, it is clear from the evidence in the record that the non-collection of the 2008 gains did not result from Mr. Roy’s choice, but from the simple fact that the transactions conducted by him in 2008 did not generate any capital gains, as shown by the T5008 slips in his file and his tax return for 2008 filed on August 12, 2019, which reported a capital loss of $10,157.71.

[30] It is important here to distinguish fiction from reality. As such, the very real effect of the fictitious capital gain of $483,903 is that Mr. Roy was taxed, for the year 2008, to the tune of $116,301 on total income of $589,645. This outcome stems from the estimated calculation conducted by CRA in 2015, which was admittedly erroneous, but which Mr. Roy failed to contest within the 90-day timeline set out in subsection 165(1) of the Act, and which crystallized when Mr. Roy allowed the ten-year timeline set out in subsection 152(4.2) of the Act to elapse. However, Mr. Roy’s counsel was never able to cite, either in the Act or in case law, a source to support the argument that a taxpayer who suffered the real tax effects of a phantom capital gain could indeed transform that phantom gain into a real loss. In view of the foregoing, it seems clear to me that the error committed by the CRA cannot serve as a basis for obtaining the tax outcome sought by Mr. Roy.

[31] As a necessary conclusion, the issue of whether Mr. Roy could report a capital loss in 2009 under the cash out rules becomes irrelevant, since there is in fact no loss corresponding to the $483,903 capital gain used to prepare his 2008 assessment. In truth, I believe that the apparent complexity of this case stems from the fact that Mr. Roy, noting that he could no longer amend his 2008 tax return, attempted to do indirectly what he could not do directly. Imagine, for a moment, an individual who had suffered damages equivalent to $300,000 and who, having

allowed the deadline for suing the alleged offending party to elapse, would later claim a debt corresponding to this amount, on the pretext that the prejudice was real. Such an individual would be hard pressed to win the case. Yet Mr. Roy has placed himself in a very similar situation.

[32] On the basis of these reasons, I conclude that the decision of the Minister's representative dated March 6, 2020, was reasonable. The application for judicial review is therefore dismissed.

VI. Conclusion

[33] The application for judicial review is dismissed, with costs.

JUDGMENT in T-576-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed, with costs.

"Peter G. Pamel"
Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-576-20
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