

Federal Court



Cour fédérale

Date: 20121212

Docket: T-1239-11

Citation: 2012 FC 1468

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 12, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JONES MOISE

Applicant

and

REVENUE CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The applicant seeks judicial review of the reassessments of his 1997, 1998, 2006, and 2007 taxation years made by the respondent. The applicant also seeks judicial review of the respondent's decision to not grant the applicant an extension of time to object to the reassessment of his 2006 taxation year.

II. Judicial procedure

[2] This is an application under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 for judicial review of (i) the reassessments of his 1997, 1998, 2006, and 2007 taxation years, dated April 30, 1998, May 1999, September 9, 2008, and April 7, 2010, respectively, (ii) the respondent's decision, dated July 5, 2010, to not grant the applicant an extension to object to the reassessment of his 2006 taxation year, and (iii) the respondent's decision, dated May 12, 2011, that the applicant was obliged to pay the amount of his tax owing in respect of his 2006 taxation year.

III. Facts

The reassessments – 1997 and 1998

[3] On April 30, 1998, the respondent reassessed the applicant's 1997 taxation year, increasing the amount of his taxable income (1997 Reassessment).

[4] In May 1999, the respondent reassessed the applicant's 1998 taxation year, again increasing the amount of his taxable income (1998 Reassessment).

[5] By May 1999, the applicant had a tax debt of \$3,913.67 for tax payable (including related interest less TPS/TVH credits) for his 1997 and 1998 taxation years.

[6] On May 31, 1999, the applicant paid \$3913.67 to the respondent in satisfaction of his tax payable for his 1997 and 1998 taxation years.

The reassessments – 2006 and 2007

[7] On May 8, 2007 and September 9, 2008, the respondent reassessed the applicant's 2006 taxation year (2006 Reassessment), reducing the amount of his charitable gift deductions and increasing his tax payable.

[8] On March 3, 2008, February 20, 2009, March 23, 2009, and April 7, 2010, the respondent reassessed the applicant's 2007 taxation year (2007 Reassessment), denying his charitable gift deductions and increasing his tax payable.

[9] By May 2011, the applicant had another tax debt of \$11,832.53 for tax payable (with related interest less TPS/TVH credits) for his 2006 and 2007 taxation years.

[10] Objections to the 2006 Reassessment and 2007 Reassessment.

[11] On April 7, 2010, the applicant objected to the reassessments of his 2006 (Notice of Objection 2006) and 2007 taxation years.

[12] On July 5, 2010, the respondent rejected the Notice of Objection 2006 since it was filed outside the limitation period. An extension of time could not be granted under paragraph 166.1(7)(a) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (ITA). The respondent advised the applicant that it could not yet accept an objection to the 2007 Reassessment because the reasons for the 2007 Reassessment were not yet issued.

[13] On January 20, 2011, according to the applicant, a judge of the Tax Court of Canada (TCC) ordered the applicant to compile and send to the respondent documents relevant to the 2007 Reassessment. The applicant has not produced any supporting documentation as to the existence of this order.

[14] On April 30, 2011, the applicant filed a notice of objection in respect of the 2007 Reassessment (Notice of Objection 2007).

[15] On May 12, 2011, the respondent notified the applicant that he had a balance owing of \$6,732.24 in respect of the 2006 Reassessment but that he had no balance currently owing on the 2007 Reassessment because the 2007 Reassessment had been contested.

[16] On May 25, 2011, the respondent accepted the Notice of Objection 2007, granting the applicant an extension of time under paragraph 166.1(7)(a) of the ITA.

[17] On September 26, 2011, the respondent denied the applicant's charitable gift deductions for his 2007 taxation year because they did not meet the requirements of subsection 3501(1) of the *Income Tax Regulations*, CRC, c 945.

[18] On November 3, 2011, the respondent confirmed its decision and advised the applicant of his right to appeal the decision to the TCC under section 169 of the ITA.

[19] In December 2011, the respondent assessed the applicant for his 2008, 2009, and 2010 taxation years and applied the applicant's tax credits to his balance owing, reducing to nil the balance owing on the 2006 Reassessment.

IV. Decision under review

[20] In the 1997 Reassessment and the 1998 Reassessment, the respondent increased the amount of the applicant's taxable income. This resulted in a tax debt of \$3,913.67 owed by the applicant to the respondent, which the applicant paid on May 31, 1999.

[21] In the 2006 Reassessment and the 2007 Reassessment, the respondent denied the applicant's charitable gift deductions, increasing his taxable income. As a result of these reassessments, the applicant was required to pay a total of \$11,832.53.

[22] The respondent accepted the applicant's Notice of Objection 2007 but refused to accept the applicant's Notice of Objection 2006. The respondent cited paragraph 166.1(7)(a) of the ITA, which provides that an application to extend the time to object to an assessment must be made within one year after the expiration of the time otherwise limited by the ITA for serving a notice of objection.

[23] The respondent decided that, although the applicant had contested the 2007 Reassessment, the applicant was still required to pay the amount of tax payable in respect of his 2006 taxation year, \$6,732.24.

V. Issues

- [24] (1) Is it within the jurisdiction of this Court to consider the correctness of the 1997 Reassessment, 1998 Reassessment, 2006 Reassessment, and 2007 Reassessment?
- (2) Has the applicant exhausted all remedies before requesting taxpayer relief?
- (3) It is within the jurisdiction of this Court to consider the respondent's refusal of the Notice of Objection 2006?

VI. Relevant legislative provisions

[25] The following legislative provisions of the ITA are relevant:

152. (8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.

...

166.1. (1) Where no notice of objection to an assessment has been served under section 165, nor any request under subsection 245(6) made, within the time limited by those provisions for doing so, the taxpayer may apply to the Minister to extend the time for serving the notice of objection or making the request.

152. (8) Sous réserve des modifications qui peuvent y être apportées ou de son annulation lors d'une opposition ou d'un appel fait en vertu de la présente partie et sous réserve d'une nouvelle cotisation, une cotisation est réputée être valide et exécutoire malgré toute erreur, tout vice de forme ou toute omission dans cette cotisation ou dans toute procédure s'y rattachant en vertu de la présente loi.

...

166.1. (1) Le contribuable qui n'a pas signifié d'avis d'opposition à une cotisation en application de l'article 165 ni présenté de requête en application du paragraphe 245(6) dans le délai imparti peut demander au ministre de proroger le délai pour signifier l'avis ou présenter la requête.

...

[...]

(7) No application shall be granted under this section unless

(7) Il n'est fait droit à la demande que si les conditions suivantes sont réunies :

(a) the application is made within one year after the expiration of the time otherwise limited by this Act for serving a notice of objection or making a request, as the case may be; and

a) la demande est présentée dans l'année suivant l'expiration du délai par ailleurs imparti pour signifier un avis d'opposition ou présenter une requête;

(b) the taxpayer demonstrates that

b) le contribuable démontre ce qui suit :

(i) within the time otherwise limited by this Act for serving such a notice or making such a request, as the case may be, the taxpayer

(i) dans le délai par ailleurs imparti pour signifier l'avis ou présenter la requête, il n'a pu ni agir ni charger quelqu'un d'agir en son nom, ou il avait véritablement l'intention de faire opposition à la cotisation ou de présenter la requête,

(A) was unable to act or to instruct another to act in the taxpayer's name, or

(B) had a bona fide intention to object to the assessment or make the request,

(ii) given the reasons set out in the application and the circumstances of the case, it would be just and equitable to grant the application, and

(ii) compte tenu des raisons indiquées dans la demande et des circonstances de l'espèce, il est juste et équitable de faire droit à la demande,

(iii) the application was made as soon as

(iii) la demande a été présentée dès que les

circumstances permitted.

circonstances le permettaient.

166.2. (1) A taxpayer who has made an application under subsection 166.1[(1)] may apply to the Tax Court of Canada to have the application granted after either

166.2. (1) Le contribuable qui a présenté une demande en application de l'article 166.1 peut demander à la Cour canadienne de l'impôt d'y faire droit après :

(a) the Minister has refused the application, or

a) le rejet de la demande par le ministre;

(b) 90 days have elapsed after service of the application under subsection 166.1(1) and the Minister has not notified the taxpayer of the Minister's decision,

b) l'expiration d'un délai de 90 jours suivant la présentation de la demande, si le ministre n'a pas avisé le contribuable de sa décision.

but no application under this section may be made after the expiration of 90 days after the day on which notification of the decision was mailed to the taxpayer.

Toutefois, une telle demande ne peut être présentée après l'expiration d'un délai de 90 jours suivant la date de la mise à la poste de l'avis de la décision au contribuable.

...

[...]

169. (1) Where a taxpayer has served notice of objection to an assessment under section 165, the taxpayer may appeal to the Tax Court of Canada to have the assessment vacated or varied after either

169. (1) Lorsqu'un contribuable a signifié un avis d'opposition à une cotisation, prévu à l'article 165, il peut interjeter appel auprès de la Cour canadienne de l'impôt pour faire annuler ou modifier la cotisation :

(a) the Minister has confirmed the assessment or reassessed, or

a) après que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation;

(b) 90 days have elapsed after service of the notice of objection and the Minister

b) après l'expiration des 90 jours qui suivent la signification de l'avis

has not notified the taxpayer that the Minister has vacated or confirmed the assessment or reassessed,

d'opposition sans que le ministre ait notifié au contribuable le fait qu'il a annulé ou ratifié la cotisation ou procédé à une nouvelle cotisation;

but no appeal under this section may be instituted after the expiration of 90 days from the day notice has been sent to the taxpayer under section 165 that the Minister has confirmed the assessment or reassessed.

toutefois, nul appel prévu au présent article ne peut être interjeté après l'expiration des 90 jours qui suivent la date où avis a été envoyé au contribuable, en vertu de l'article 165, portant que le ministre a ratifié la cotisation ou procédé à une nouvelle cotisation.

...

[...]

220. (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.

220. (3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

[26] The following legislative provisions of the Tax Court of Canada Act, RSC 1985, c T-2 (TCCA) are relevant:

12. (1) The Court has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under the *Air Travellers Security Charge Act*, the *Canada Pension Plan*, the *Cultural Property Export and Import Act*, Part V.1 of the *Customs Act*, the *Employment Insurance Act*, the *Excise Act, 2001*, Part IX of the *Excise Tax Act*, the *Income Tax Act*, the *Old Age Security Act*, the *Petroleum and Gas Revenue Tax Act* and the *Softwood Lumber Products Export Charge Act, 2006* when references or appeals to the Court are provided for in those Acts.

12. (1) La Cour a compétence exclusive pour entendre les renvois et les appels portés devant elle sur les questions découlant de l'application de la *Loi sur le droit pour la sécurité des passagers du transport aérien*, du *Régime de pensions du Canada*, de la *Loi sur l'exportation et l'importation de biens culturels*, de la partie V.1 de la *Loi sur les douanes*, de la *Loi sur l'assurance-emploi*, de la *Loi de 2001 sur l'accise*, de la partie IX de la *Loi sur la taxe d'accise*, de la *Loi de l'impôt sur le revenu*, de la *Loi sur la sécurité de la vieillesse*, de la *Loi de l'impôt sur les revenus pétroliers* et de la *Loi de 2006 sur les droits d'exportation de produits de bois d'œuvre*, dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

[27] The following legislative provisions of the *Financial Services Act*, RSC, 1985, c F-11 (FSA) are also relevant:

23. (2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or

23. (2) Sur recommandation du ministre compétent, le gouverneur en conseil peut faire remise de toutes taxes ou pénalités, ainsi que des intérêts afférents, s'il estime que leur perception ou leur exécution forcée est déraisonnable ou injuste ou que, d'une façon générale, l'intérêt public justifie

unjust or that it is otherwise in the public interest to remit the tax or penalty. la remise.

VII. Position of the parties

[28] The applicant requests that this Court review and vacate the 1997 Reassessment and the 1998 Reassessment. In particular, he seeks the return of part of the amount of \$3,913.67 that he paid to the respondent in satisfaction of his tax debts for these reassessments. He submits (i) that, according to calculations by his accountant, he only owed \$446.91 in relation to his 1997 taxation year and \$2,123.72 in relation to his 1998 taxation year and (ii) that, consequently, he made an overpayment of \$1,343.04 to the respondent.

[29] The applicant also requests that this Court review and vacate the assessment of his 2006 taxation year and his tax debt of \$6,746.08 in respect of that year.

[30] The applicant argues that the respondent should not have denied his charitable gift deductions in respect of his 2006 taxation year. He states that he purchased musical instruments, which he donated to his church, and that he has produced supporting documentation for this purchase. He states, however, that he cannot produce documentation for all of expenditures in relation to his charitable gift deduction.

[31] The applicant further submits (i) that he has not committed any tax fraud, (ii) that he has financial difficulties that should be considered assessing his tax obligations, (iii) that he became indebted in order to pay his tax debt to the respondent and that he should consequently be reimbursed, (iv) that he received no guidance from the respondent in managing his tax affairs, and

(v) that the respondent has impermissibly profited from his ignorance as a recent immigrant to this country.

[32] The applicant argues that the respondent should not have rejected his Notice of Objection 2006 simply because it was not sent within the prescribed limitation period.

[33] The respondent submits that the applicant's request for judicial review is not within the jurisdiction of this Court. According to the respondent, the applicant has contested the validity and well-foundedness of the 2006 Reassessment and the 2007 Reassessment – questions that fall outside the jurisdiction of the Federal Court.

[34] The respondent argues that subsection 152(8) of the ITA deems an assessment made under the ITA (subject to being varied or vacated on an objection or appeal under Part I the ITA) to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under the ITA relating to the assessment. The respondent cites *Roitman v R*, 2006 FCA 266 for the proposition that the corollary of subsection 152(8) is that this Court “does not have jurisdiction to award damages or grant any other relief that is sought on the basis of an invalid reassessment of tax unless the reassessment has been overturned by the Tax Court” (at para 20).

[35] The respondent further submits that this Court cannot consider the respondent's rejection of the Applicant's Notice of Objection 2006. According to the respondent, the applicant filed his Notice of Objection 2006 in April 2010—19 months after the respondent reassessed the applicant's 2006 taxation year. The respondent notes that paragraph 166.1(7)(a) of the ITA provides that a

request for extending the time for serving a notice of objection shall not be granted unless the request is made within one year after the expiration of the time otherwise limited by the ITA for serving the notice of objection. Citing *Carlson v R*, 2002 FCA 145, the respondent argues that it did not have the discretion to grant the applicant's request for an extension.

VIII. Analysis

(1) Is it within the jurisdiction of this Court to consider the applicant's request for judicial review of the reassessments of his 1997, 1998, 2006, and 2007 taxation years?

[36] The applicant's request that this Court review and vacate the reassessments of his 1997, 1998, 2006, and 2007 taxation years essentially challenges the correctness of those reassessments. With respect to the 1997 Reassessment and 1998 Reassessment, the applicant argues that the respondent miscalculated his tax payable and that he consequently made an overpayment of \$1,343.04 to the respondent. This is a challenge to the correct tax liability of the applicant. The applicant's complaints as to the 2006 Reassessment and the 2007 Reassessment centre mainly on whether his expenditures were eligible for a charitable gift deduction; thus, they also ultimately relate to whether the reassessments are correct.

[37] In asking this Court to review the reassessments for their correctness, the applicant seeks from this Court a remedy it cannot give for want of jurisdiction.

[38] Subsection 152(8) of the ITA provides that an assessment shall, subject to being varied or vacated on an objection or appeal under Part I of the ITA and subject to reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding in the ITA relating thereto. Under subsection 169(1) of the ITA, a taxpayer may appeal

to have an assessment vacated or varied if the conditions regarding the appeal process under the ITA are satisfied. Subsection 12(1) of the TCCA gives the TCC exclusive jurisdiction to hear and determine references and appeals on matters arising under the ITA.

[39] This Court follows the reasoning of the Federal Court of Appeal in *Roitman*, above that the corollary of subsections 152(8) and 169(1) of the ITA and of subsection 12(1) of the TCCA is that the TCC has “exclusive jurisdiction to determine the correctness of tax assessments” (at para 19). This Court “does not have jurisdiction to award damages or grant any other relief that is sought on the basis of an invalid reassessment of tax unless the reassessment has been overturned by the Tax Court” because to do otherwise would “permit a collateral attack on the correctness of an assessment” (at para 20).

[40] The applicant has not adduced any proof that there has been an abuse of process or an abuse of power by the respondent, which would fall outside the jurisdiction of the TCC (*Main Rehabilitation Co v R*, 2004 FCA 403).

(2) Has the applicant exhausted all remedies before requesting taxpayer relief?

[41] The applicant’s request that his financial hardship be considered in addressing his obligation to pay his tax debts can be construed as a request for taxpayer relief.

[42] The applicant may apply to the respondent for a waiver of the interest and penalties owed by the applicant in respect of the 2006 Reassessment and 2007 Reassessment (Taxpayer Relief). Subsection 220(3.1) of the ITA gives the Minister of National Revenue discretion to, on the day that

is ten calendar years after the end of a taxation year of a taxpayer or on application by the taxpayer on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under the ITA by the taxpayer in respect of that taxation year, and notwithstanding subsections 152(4) to (5) of the ITA, any assessment of the interest and penalties payable by the taxpayer shall be made that is necessary to take into account the cancellation of the penalty or interest. This responsibility is delegated to the respondent under subsection 220(1) of the ITA. The respondent does not, however, have the discretion to waive the interest and penalties in respect of the 1997 Reassessment and the 1998 Reassessment because the statutory limitation period has expired.

[43] The applicant may also seek an order under subsection 23(2) of the FSA for the remission of any tax payable or penalty (including interest paid and payable) (Remission Order). Subsection 23(2) permits the Governor in Council, at the recommendation of the Minister of National Revenue, to remit any tax or penalty, including any interest paid or payable thereon, if the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.

[44] The applicant, however, has failed to pursue these remedies before applying to this Court. Subject to exceptions, an applicant must exhaust all internal administrative remedies before applying to this Court for judicial review (*Brokenhead First Nation v Canada (Attorney General)*, 2011 FCA 148). In *Bakayoko v Bell Nexxia*, 2004 FC 1408, this Court found that a party's point of departure in any administrative proceeding is "to know which door to approach in order to be heard" and that this Court "cannot hear a case as long as some other proper remedy exists" (at para 1).

[45] In the present case, the applicant has not pursued the internal administrative remedies of Taxpayer Relief or a Remission Order. The applicant cannot request judicial review of the respondent's refusal to grant Taxpayer Relief because the applicant has not taken the first step of applying to the respondent for such relief.

(3) It is within the jurisdiction of this Court to consider the respondent's refusal of the Notice of Objection 2006?

[46] This Court does not have jurisdiction to assess the respondent's refusal of the Notice of Objection 2006 or to grant an extension under subsection 166.1(7) of the ITA. Under subsection 166.2(1) of the ITA, a taxpayer who has applied under subsection 166.1(1) of the ITA for an extension of time must apply to the TCC to have the application granted after either (i) the application has been refused or (ii) 90 days have elapsed after service of the application and the taxpayer has not been notified of the decision. An application to the TCC under subsection 166.2(1) may not be made after the expiration of 90 days after the day on which notification of the decision not to grant an extension of time has been sent. Subsection 166.2(1) gives the TCC exclusive jurisdiction over requests for extensions of time to file a notice of objection under the ITA and this Court cannot intervene.

IX. Conclusion

[47] For all of the above-mentioned reasons, the applicant's application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that the applicant's application for judicial review is dismissed.

"Michel M.J. Shore"

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1239-11

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**REASONS FOR JUDGMENT
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DATED: December 12, 2012

APPEARANCES:

Jones Moise

FOR THE APPLICANT
(SELF-REPRESENTED)

Nathalie Hamam
Nancy Arnold

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jones Moise
Toronto, Ontario

FOR THE APPLICANT
(SELF-REPRESENTED)

William F. Pentney
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT