Federal Court  Cour fédérale

Date: 20160516

Docket: T-309-15

Citation: 2016 FC 547

Ottawa, Ontario, May 16, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

AFD PETROLEUM LTD.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant is an Alberta-based company that supplies bulk fuel, lubricants, and storage systems to customers across Canada and in parts of the United States.

[2] On December 31, 2013, the Applicant requested that its 2012 corporate income tax return be amended to include a claim for Scientific Research and Experimental Development [SR&ED] expenditures. The Applicant submitted a Form T661 and related schedules in respect of the SR&ED claim for its expenditures incurred to develop a portable refueling mechanism for

fracking equipment. The Applicant claimed these expenditures, which totalled some $357,000, in order to obtain a deduction from its 2012 income under section 37 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the *ITA*].

[3] The Canada Revenue Agency, however, found the Form T661 as submitted was not fully completed because, although the Applicant had submitted the claim on the last date for filing it, CRA received only two of the seven pages that then comprised Part 2 of the Form. Consequently, in a letter dated January 22, 2014, CRA denied the Applicant's request for an adjustment to its 2012 tax return to claim for an SR&ED investment tax credit since the prescribed information was not filed within 12 months after the due date for filing the T2 tax return. After communications between CRA representatives and the Applicant's accountants failed to reverse this denial, the Applicant's legal counsel wrote a letter dated October 30, 2014 to the CRA, questioning the CRA's position and arguing that the Form was properly filed. The Applicant's counsel asserted that, despite the Form not being fully completed, all the required information was nevertheless included in the Form when viewed as a whole and the filing should not be vitiated or negated.

[4] The CRA responded in a letter dated January 30, 2015, finding that not all prescribed information requested in Part 2 of the Form was provided. The CRA justified this finding on the basis that the Applicant's description of the activities in developing its refueling mechanism in line 240 of the pages of the Form that the Applicant *had* submitted, did not include the information that should have been supplied in response to the questions at lines 244 and 242 of the Form; lines 244 and 242 dealt with the technological obstacles and uncertainties the

Applicant faced and what work was performed to overcome them to achieve the technological advancements described in line 240. The CRA thus concluded that "we cannot accept the [SR&ED] claim as complete."

[5] The Applicant now applies, pursuant to section 18.1 of the *Federal Courts Act*, R.C.S. 1985, c. F-7, as am [the *FCA*], for judicial review of CRA's rejection of its SR&ED claim for its 2012 tax year.

I. Issues

[6] This application raises the following issues:

1) Is the matter properly before the Federal Court?

2) If so, what is the appropriate standard of review?

3) Was CRA's decision substantively unreasonable such that it should be quashed?

4) Was CRA's decision procedurally unfair such that it should be quashed?

II. Analysis

A. *Is this matter properly before the Federal Court?*

[7] It is necessary to consider whether this Court has jurisdiction to hear this matter because it is indirectly raised by the Applicant's argument that, by rejecting the Form as incomplete, CRA wrongfully converted the Applicant's SR&ED claim into a "non-filing" which has not been assessed on its merits and is therefore not appealable to the Tax Court of Canada. Although the Respondent does not contest that this matter is not appealable to the Tax Court, she does state

that at the time the Applicant filed the Form it did not have a right of objection or appeal since the objection period for the Applicant's 2012 taxation year had expired by that time.

[8] In addressing this issue, I begin by noting that subsection 12(1) of the *Tax Court of Canada Act*, R.S.C. 1985 c. T-2 [*TCCA*], empowers the Tax Court of Canada with "exclusive original jurisdiction to hear and determine references and appeals … on matters arising under [various Acts, including] … the Income Tax Act … when references or appeals to the Court are provided for in those Acts.". That court also has exclusive original jurisdiction to hear and determine questions referred to it under sections 173 or 174 of the *ITA* (*TCCA* ss. 12(3)).

[9] Furthermore, subsection 18.5 of the *FCA* divests the Federal Court of its administrative law jurisdiction for any matter that can be resolved by an appeal to the Tax Court (see: *Canada (National Revenue) v Sifto Canada Corp.*, 2014 FCA 140 at para 21, 241 ACWS (3d) 487 [*Sifto*]). Consequently, although the Federal Court has broad powers with respect to judicial review, it cannot deal with matters which are properly appealed to the Tax Court (see: *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para 27, [2014] 2 FCR 557 [*JP Morgan*]).

[10] When faced with an application for judicial review concerning matters arising in relation to the *ITA*, this Court must read and assess the application "holistically with a view to understanding its essential character, rather than fastening on matters of form" (*Sifto* at para 25). It must also be alert to "skilful pleaders" who can "make Tax Court matters sound like administrative law matters when they are nothing of the sort" (*JP Morgan* at para 49). Also, it is

clear that the Federal Court's jurisdiction includes judicial review of the exercise of ministerial discretion by the Minister of National Revenue [the Minister] provided the matter is not otherwise appealable (see: *Canada v Addison & Leyen Ltd.*, 2007 SCC 33 at para 8, [2007] 2 SCR 793).

[11] To properly be in Federal Court an applicant must: (1) show that judicial review is available under sections 18 and 18.1 of the *FCA*; and (2) "state a ground of review that is known to administrative law or that could be recognized in administrative law" (*JP Morgan* at paras 68-70). In *JP Morgan*, the Federal Court of Appeal identified (at para 70) three grounds of judicial review known to administrative law, namely: (a) lack of *vires*; (b) procedural unacceptability; and (c) substantive unacceptability (i.e., a decision that is not reasonable).

[12] Sections 18 and 18.1 of the *FCA* focus on the Federal Court's jurisdiction and the timelines and available remedies with respect to an application for judicial review. In this case, the Applicant has met the appropriate timelines for its judicial review application and is requesting a remedy within this Court's jurisdiction; namely, that CRA's decision dated January 30, 2015 be quashed. Consequently, its application for judicial review satisfies the first requirement emanating from *JP Morgan* (at paras 68-69; *Air Canada v Toronto Port Authority et al*, 2011 FCA 347 at paras 24-29, [2013] 3 FCR 605).

[13] The second prong of the *JP Morgan* test asks whether the application states a ground of review known to administrative law or one which could be recognized in administrative law. In this case, the Applicant raises an issue of substantive unacceptability; namely, the

unreasonableness of the Minister's determination she could not accept the Applicant's incomplete Form T661 for filing because not all the prescribed information was provided. Inherent in this issue is an allegation that the Minister improperly exercised her discretion in rejecting the Form as being incomplete. The Applicant also raises an issue of procedural fairness or procedural unacceptability, asserting that because CRA determined that the Form as filed was incomplete and not accepted, the Applicant has been arbitrarily deprived of its right to object to the Chief of Appeals for CRA and subsequently appeal to the Tax Court to have its SR&ED claim assessed on its merits. These issues, in turn, prompt the question of whether they raise cognizable administrative law claims which can be brought in this Court.

[14] The issues raised by the Applicant do not fall clearly or squarely within one of the specifically enumerated bases of the Tax Court's jurisdiction and powers in sections 12 and 13 of the *TCCA*; nor does this application involve a specific reference on an issue arising under the *ITA*.

[15] SR&ED claims are governed by section 37 of the *ITA*. The term "SR&ED" is defined in subsection 248(1) of the *ITA*. Section 37 does not specifically address appeals where SR&ED claims are denied. Generally, the denial of an SR&ED claim is appealable to the Tax Court after a taxpayer's income tax return for a taxation year has been assessed by the Minister, as was the situation in cases such as *1726437 Ontario Inc. v R.*, 2012 TCC 376, 221 ACWS (3d) 1039; *Hypercube Inc. c R.*, 2015 TCC 65, 250 ACWS (3d) 530; and *ACSIS EHR Inc. v R.*, 2015 TCC 263, 258 ACWS (3d) 840. Such cases, however, address whether an SR&ED claim was properly denied because it did not meet the requirements for a valid SR&ED claim such as there being a

technical risk or uncertainty, the formulation of hypotheses specifically aimed at reducing or eliminating that technological uncertainty, and the adoption of procedures in accord with established and objective principles of scientific method.

[16] In this case, the Applicant's SR&ED claim for its 2012 tax year has not been assessed on its merits or evaluated by the Minister at all, except insofar as it was not accepted as part of the Applicant's income tax return for 2012 because it was, in the Minister's view, incomplete and did not provide all the prescribed information requested in Form T661. Furthermore, when the Applicant filed the Form it did not have any right of objection or appeal because the objection period for the Applicant's 2012 taxation year had expired, notwithstanding the fact that the time within which the Applicant could file the Form had not expired. In addition, the Applicant could not request that the Minister exercise her discretion and waive the requirement for the prescribed information under subsection 220(2.1) of the *ITA* because subsection 220(2.2) explicitly removes this discretion of the Minister in respect of SR&ED claims not filed within 12 months after a taxpayer's filing due date for the year.

[17] In these circumstances, and since the issues raised by the Applicant advance cognizable administrative law claims, I conclude that the Court has jurisdiction to hear and decide the Applicant's application for judicial review. On the facts of this matter, there is no specific appeal to the Tax Court and section 18.5 of the *FCA* is not applicable. Accordingly, I now turn to determine what standard of review the Court should adopt to review the decision and its procedural or substantive acceptability.

B. *What is the appropriate standard of review?*

[18] Although neither party directly addressed this question in their written memoranda, the Applicant submitted during oral argument that the appropriate standard of review is one of correctness because the question of whether its SR&ED claim was properly filed is a question of law in view of section 32 of the *Interpretation Act*, R.S.C. 1985, c I-21. For its part, the Respondent stated at the hearing of this matter that the relevant standard of review, in view of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], is one of reasonableness and that the Court should show deference to CRA's decision.

[19] When a previous court has determined the applicable standard of review, the reviewing court may adopt that standard (*Dunsmuir* at para 62). However, there is an absence of relevant case law on the appropriate standard of review with respect to the decision under review and the circumstances by which it was rendered. Neither party identified existing jurisprudence to establish the appropriate standard of review. Absent any question of law central to the legal system, the starting point for assessing the appropriate standard of review is reasonableness rather than correctness.

[20] The decision in this case involves the interpretation of the CRA's home statute, the *ITA*, and the associated policy, the *SR&ED Filing Requirements Policy* [the *Policy*]. Hence, a standard of reasonableness presumptively applies: *Alberta (Information & Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30, [2011] 3 SCR 654 [*Alberta Teachers*]. The decision maker has expertise in the matter and, accordingly, is entitled

to due deference (*Dunsmuir*, at paras 68 and 124; *Alberta Teachers* at para 39). The decision is not one outside the specialized expertise of the decision maker (*Dunsmuir* at para 70), nor does it involve a question of law central to the legal system. All of this being so, and there being no compelling reason to displace the presumption that a standard of reasonableness applies, I conclude that CRA's decision in this case should be reviewed on a standard of deferential reasonableness.

[21] Consequently, the Court should not interfere if the decision is intelligible, transparent, justifiable, and defensible in respect of the facts and the law: *Dunsmuir* at para 47. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 S.C.R. 708.

[22] As for the issue of procedural fairness or procedural unacceptability raised by the Applicant, the Supreme Court has stated recently that correctness continues to be the standard of review in respect of procedural fairness issues (see: *Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502). With respect to this issue, therefore, the appropriate standard of review is one of correctness (although parenthetically it deserves note that in *Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59 at paras 46-63, 373 DLR (4^{th}) 167, the Federal Court of Appeal has recognized that some issues of procedural fairness might attract the reasonableness standard rather than the correctness standard).

C. *Was CRA's decision substantively unreasonable such that it should be quashed?*

[23] The Applicant argues CRA improperly relied upon the *Policy* and should have instead relied upon section 32 of the *Interpretation Act*, which states that:

32 Where a form is prescribed, deviations from that form, not affecting the substance or calculated to mislead, do not invalidate the form used.	**32** L'emploi de formulaires, modèles ou imprimés se présentant différemment de la présentation prescrite n'a pas pour effet de les invalider, à condition que les différences ne portent pas sur le fond ni ne visent à induire en erreur.

[24] The Applicant submits, in view of *Mitchell v Canada*, 2002 FCA 407, [2003] 2 FC 767 [*Mitchell*], that the question is not whether a particular section of a form was completed but, rather, whether the information that was provided was sufficient viewing the Form as filed as a whole. According to the Applicant, the Form it filed in this case included in line 240 the information which would otherwise and normally have been included in the two missing lines, and, based on *Mitchell*, CRA cannot claim that the Form was not complete. The Applicant says no basic information was missing from the Form as filed so as to make review and assessment of its SR&ED claim for 2012 by CRA impossible; in any event, CRA had any missing information available through the Applicant's SR&ED claim for 2013 involving the same project.

[25] The Applicant's reliance upon section 32 of the *Interpretation Act* and *Mitchell* is misguided. Section 32 of the *Interpretation Act* does not assist the Applicant in this case because the taxpayer's letter in *Mitchell*, unlike the Form submitted by the Applicant in this case, contained all the prescribed information and hence constituted a valid waiver notwithstanding the

fact that a prescribed form of waiver had not been used. In this case, although the Applicant had submitted two pages of Part 2 of Form T661, CRA found that the Form as submitted by the Applicant was not complete because it did not contain all the prescribed information requested in lines 242 and 244. This determination by CRA raises the question as to whether there was, nevertheless, sufficient information contained in line 240 such that its determination -- that the Form was incomplete -- was unreasonable.

[26] Despite the Applicant's argument to the contrary, the prescribed information the Applicant did submit in line 240 of the Form does not provide the prescribed information as requested in lines 242 and 244. The fact of the matter is that the pages of the Form containing lines 242 and 244 were not completed at all or even submitted by the Applicant and there does not appear to be any information in line 240 that specifically supplies the requested and missing information. It was reasonable, in my view, for CRA to find that such information was absent and the claim was therefore not complete. More to the point, the Applicant has not specifically identified any information in the Form it submitted that addresses these two missing areas of prescribed information. The Applicant mischaracterizes the missing information as being just "two missing lines." The questions at lines 242 and 244 of Part 2 of Form T661 contemplate responses of up to a maximum of 350 and 700 words, respectively. This case is not, as the Applicant would have it, merely a matter of two missing lines in a prescribed form.

[27] As to the Applicant's argument that the missing information was already filed with CRA in connection with its 2013 SR&ED claim and should have been utilized for purposes of its 2012 claim, the Applicant cites no case law to support this argument. Furthermore, nothing in the *ITA*

requires the Minister to check a taxpayer's filings for other taxation years before determining whether prescribed information for a different taxation year is missing in a Form T661. It is significant that Form T661 specifically requests information in relation to only the one tax year for which the SR&ED claim is made. In view of the possibility that the technological obstacles and uncertainties a taxpayer faced and what work was performed to overcome them in one tax year could readily change from one year to the next, the Minister should not be obligated to adopt and accept information from another SR&ED claim in determining that prescribed information is missing from the claim for the taxation year in question.

[28] In short, therefore, CRA's determination in this case that the Form as submitted by the Applicant could not be accepted because not all prescribed information had been provided was reasonable. This decision is justifiable and defensible in respect of the facts and the law and clearly falls within the range of acceptable outcomes.

D. *Was CRA's decision procedurally unfair such that it should be quashed?*

[29] The Applicant contends that, by not accepting the Form as filed because it was not complete, CRA has made its SR&ED claim for 2012 a non-filing and therefore non-appealable to the Tax Court. The Applicant asserts that CRA is to scrutinize the Form and, if there is insufficient information, it can conduct a review to determine whether the claim should be allowed. According to the Applicant, it is common for an SR&ED claim to be denied initially, with further supporting information subsequently provided to address the Minister's questions or concerns; if the claim is again denied, it can then be appealed to the Tax Court. The Applicant argues that this is an arbitrary deprivation of its rights.

[30] In contrast, the Respondent argues that the Applicant had options that it chose not to exercise, and the consequence of not filing a complete Form meant that the Minister could not accept the Applicant's SR&ED claim for 2012. According to the Respondent, the Minister did not deprive the Applicant of any procedural rights because the Applicant could have filed the Form when it filed its income tax return for 2012 some 12 months earlier and, after that return was assessed, then be able to object under section 165 of the *ITA*. The Respondent points out that the Applicant chose instead to request an amendment on its 2012 T2 return to add the SR&ED claim on the last day possible, after the objection period for its 2012 tax year had expired.

[31] The Respondent also points out that the Applicant's SR&ED claim for its 2012 taxation year was made by way of an amendment to its T2, and that the Minister cannot be compelled to consider such a request. As stated by the Federal Court of Appeal in *Armstrong v Canada (Attorney General)*, 2006 FCA 119, 147 ACWS (3d) 327:

> [8] An amended return for a taxation year that has already been the subject of a notice of assessment does not trigger the Minister's obligation to assess with all due dispatch (subsection 152(1) of the *Income Tax Act*), nor does it start anew any of the statutory limitation periods that commence when an income tax return for a particular year is filed and then assessed. *An amended income tax return is simply a request that the Minister reassess for that year.* [Emphasis added]

[32] The Respondent further notes *Imperial Oil Ltd. v R.*, 2003 TCC 46, 120 ACWS (3d) 694, where the Tax Court observed as follows:

> [38] Counsel for the respondent argues that there is no way a taxpayer can protect itself from errors in its own returns other than, perhaps, relying upon the Minister's leniency in accepting amended returns and assessing so as to permit the taxpayer to object if the Minister refuses to give effect to the amended return. *There is no mechanism whereby the Minister can be compelled to*

> *accept an amended return or to act upon it if he chooses not to.* I do not share counsel's faith in the Minister's magnanimity in voluntarily accommodating a taxpayer's requests to amend its returns. A taxpayer's legal right to compel reassessments lies in the objection and appeal process. [Emphasis added]

[33] In the circumstances of this case, CRA's determination not to accept the Form T661 as submitted by the Applicant was not procedurally unfair. Not only was this determination reasonable for the reasons stated above, it did not, as the Applicant contends, wrongfully convert an appealable SR&ED claim into a non-appealable non-filing. The Minister did not deprive the Applicant of any procedural rights because the Applicant could have filed the Form some 12 months earlier than it did when it filed its income tax return for 2012.

[34] In this case, the Applicant, for whatever reason, failed to follow the advice contained in paragraph 2.1 of the *Policy*, which states in part that: "Although the claimant has an additional 12 months after the income tax return filing due date for the year, the claimant is advised to file the prescribed form for SR&ED expenditures, on or before the filing due date of the income tax return." The Applicant also appears to have either disregarded or failed to heed the warning in paragraph 7.2 of the *Policy*, which states:

> If prescribed forms are filed on or before the SR&ED reporting deadline (see section 6.0), but they do not contain all the prescribed information in respect of the expenditures (see section 4.1) being claimed or the prescribed information in respect of the ITC amount earned on the expenditures (see section 4.2); the claimant will not be considered to have met the filing requirements for these expenditures or ITC. If the forms are reviewed by the CRA before the SR&ED reporting deadline, the CRA will advise the claimant of any deficiencies and **the claimant will be allowed, up to the SR&ED reporting deadline**, to provide any missing information. The onus is on the claimant to file the prescribed forms containing the prescribed information on time. [Emphasis in original]

[35] With respect to this issue, therefore, CRA's decision was not procedurally unfair and the Court's intervention is not required.

III. Conclusion

[36] In view of the foregoing, the Applicant's application for judicial review is denied.

[37] The Respondent is entitled to costs in such amount as may be agreed to by the parties. If the parties are unable to agree as to the amount of such costs within 15 days of the date of this judgment, either party shall thereafter be at liberty to apply for an assessment of costs in accordance with the *Federal Courts Rules*.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant's application pursuant to section 18.1 of the *Federal Courts Act*, R.C.S. 1985, c. F-7, as am, is dismissed; and

2. The Respondent shall have its costs of this application in such amount as may be agreed to by the parties. If the parties are unable to agree as to the amount of such costs within 15 days of the date of this judgment, either party shall thereafter be at liberty to apply for an assessment of costs in accordance with the *Federal Courts Rules*.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jeff D. Pniowsky	FOR THE APPLICANT
Julien Bédard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Thompson Dorfman Sweatman LLP Barristers and Solicitors Winnipeg, Manitoba	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT