Federal Court Cour fédérale

Date: 20170223

Docket: T-1842-15

Citation: 2017 FC 226

Ottawa, Ontario, February 23, 2017

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

CYBERNIUS MEDICAL LTD.

Applicant

And

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by the Minister of National Revenue [the Minister] not to give back money owed to Cybernius Medical Ltd. [Cybernius]. The Minister has decided to keep the nearly $600,000.00 credit rather than use it to pay debts owed by Cybernius. The Minister can exercise its discretion to assist a taxpayer to ensure taxes are paid. What matters in the end is that the tax is paid.

II. Background

[2] The Notice of Application of this judicial review indicates it is the October 19, 2015, Scientific Research and Experimental Development [SRED] decision that is to be reviewed but this issue is now moot. On November 4, 2015, the Minister refused (and at the time of writing this judgment continues to refuse) to review a re-appropriation request from Cybernius. This application is what *Federal Courts Rules*, SOR 98-106, Rule 302 regards as a continuous course of conduct as the decisions all deal with the same factual situations with the same legal issues (*Krause v Canada*, [1999] 2 FC 476 (FCA)).

[3] The facts of this case are largely not in dispute between the parties. Cybernius is a corporation whose primary business is electronic medical record-keeping specific to kidney disease. In the 2003, 2004, and 2005 taxation years [the relevant years], Cybernius was in a start-up phase. In the first two of these years, Cybernius incurred net taxable losses. In the third, Cybernius generated modest taxable income of approximately $20,000.00. Cybernius did not file corporate income tax returns during this time.

[4] In December 2006, the Minister assessed Cybernius for the relevant years on the basis that it was liable for taxes, penalties and interest in an amount of $534,365.28. In November 2009, the Minister reassessed Cybernius for the 2003 taxation year. Cybernius alleges that neither the 2006 assessments nor the 2009 reassessment were ever communicated to them and as such were never completed.

[5] In December 2009, the Minister garnished $937,048.23 from Cybernius by way of a Requirement to Pay [RTP] issued to Cybernius' escrow agent. Of this amount, $594,447.21 was intended to be applied to "purported assessments" corporate income tax arrears. This case revolves around the $594.447.21 and not the larger amount paid to the escrow agent.

[6] In January 2014, Cybernius attempted to file its corporate income tax returns with the Minister for the relevant years. The Minister rejected the returns and Cybernius was informed that the normal reassessment period for those years had expired. Cybernius alleges that it was at this time that it first became aware of the December 2006 assessments and November 2009 reassessment.

[7] Cybernius filed an objection with the Minister that was initially rejected as being out of time. After bringing an application for an extension of time to object with the Tax Court of Canada, Cybernius and the Minister agreed, by way of consent judgment, that the objection was valid. The consent judgment, issued May 15, 2015, quashed Cybernius' application for an extension of time to file a notice of objections for the 2004 and 2005 taxation years. It also quashed a reassessment for the 2003 taxation year. The consent judgment held that Cybernius' notice of objection to the assessments, filed March 20, 2014, were a valid notices of objection to the assessments filed on that day which encompassed the 2003, 2004, 2005 taxation years.

[8] In response to the objections in June 2015, the Minister issued notices of reassessment with respect to the relevant years. The reassessments resulted in a $594,854.58 credit owed to

Cybernius. In addition to this credit, Cybernius is also entitled to a $465,922.84 tax credit in connection with SRED credits.

[9] On September 14, 2015, Cybernius requested that the Minister first set-off the $594,854.58 reassessment credit owed to Cybernius against the $800,000.00 payroll source deductions owed by Cybernius. Cybernius asked that this be done before applying the $465,922.84 in SRED credits to the remainder of the source deduction debt. Cybernius in that letter indicated that they were about to claim SRED credits for 2013 and 2014 in an amount of $300,000.00 for an anticipated credit of $765,000.00 in addition to the $594,854.58 for a total of $1,360,000.00 in credits.

[10] The Minister determined that both the relevant years' credit and the SRED credits could not be used to pay the outstanding debt. The Minister decided this as Cybernius' T2 corporate income tax returns for tax years 2013 and 2014 had not been submitted and Cybernius was missing a GST return. Cybernius was also told the credits could not be used as Cybernius' corporate income tax returns had not been filed within three years of the end of each relevant year.

[11] Cybernius' outstanding GST return was filed on September 11, 2015 and their T2 corporate tax return for the 2013 taxation year was filed on October 6, 2015.

[12] On October 19, 2015, the Minister set-off Cybernius' SRED credits against the outstanding source payroll debt of Cybernius as requested but then realized that the tax returns

were not all filed. On November 4, 2015, the Minister reversed its error and told Cybernius in correspondence that the SRED credits were returned to Cybernius' tax account.

[13] On October 23, 2015, Cybernius submitted Form RC431 Request for Re-Appropriation of T2 statute-barred credits. Among other things they submitted that:

> …the statute-barred credits should not be subject to subsection 164(1) of the Income Tax Act since the said funds were appropriated by the Minister on December 23, 2009 at a time when the taxpayer had not received the notices of assessment for the years at issue (i.e. 2003, 2004, 2005, the "subject years"), based on the Consent To Judgement dated May 8, 2015 (see attached) whereby the Minister agreed that the notices of objection for the subject years, filed on March 20, 2014, were filed within 90 days (or December 20, 2013) of the notices of assessment for the subject years being sent or otherwise communicated to the taxpayer by the Minister. As a result, since the Minister agreed that the notices of assessment were not sent or otherwise communicated to the taxpayer before December 20, 2013, and the funds were appropriated by the Minister approximately 4 years earlier on December 23, 2009, we submit that the taxpayer should be entitled to a refund of the funds appropriated by the Minister on December 23, 2009 since the funds were appropriated at a time when the taxpayer had not yet received the notices of assessment and therefore the debt was not yet owing by the taxpayer.

[14] On November 4, 2015, the Minister refused to review the re-appropriation request on the basis that Cybernius was non-compliant as they had not filed their T2 tax return for 2014. At the start of the hearing, Cybernius and the Minister's counsel confirmed that the remaining 2014 tax return has been filed and Cybernius is now compliant with all filings.

[15] Cybernius seeks an order, by way of certiorari, to quash the Minister's decision not to re-appropriate the $594.447.21. It also seeks an order of mandamus for the Minister to pay the reassessment credit plus interest back to Cybernius or set-off the reassessment credit against

Cybernius' payroll source deductions debt now that it is fully compliant. Cybernius seeks solicitor-client costs in connection with the application.

III. Issues

[16] The parties provided what they saw as the points in issue. Cybernius set the issues out as:

A. Should the Minister be ordered to either return the Relevant Years' Credit, together with any interest thereon, to the Applicant, or else to set-off the relevant years' credit, together with any interest thereon, against the Source Deductions Debt?

B. Should the Applicant be awarded solicitor-client costs in connection with this application?

[17] The Respondent submitted the issues as:

C. Whether the amount in question is an "overpayment" within the meaning of subsection 164(7) of the ITA?

D. Whether the amount is an amount payable under the ITA within the meaning of subsection 164(2.01) of the ITA?

E. To the extent the amount is in fact payable, whether the Minister has any duty to pay it directly to the Applicant?

[18] As will be seen in my analysis, the issue to be determined is whether the exercise of discretion by the Minister not to re-appropriate $594.447.21 after Cybernius requested that credit be put towards their payroll source deduction tax liability, is reasonable?

IV. Analysis

A. *Jurisdiction of the Federal Court*

[19] In their memorandum, Cybernius argued that this Court has jurisdiction to hear the matter because this application is regarding the legality of collection action taken by Canada Revenue Agency. The Minister did not address any jurisdictional issues in their written materials. However, they did address whether some of the relief sought was available.

[20] It is the Court's role to ensure the Federal Court has jurisdiction. *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], section 18.5 sets out the jurisdictional exceptions to sections 18 and 18.1:

Exception to sections 18 and 18.1	**Dérogation aux art. 18 et 18.1**
18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.	18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

[21] If the issue at bar provides a right of appeal to the Tax Court of Canada or the Federal Court of Appeal, then it is an exception under section 18.5 and is not subject to judicial review by the Federal Court.

[22] The Applicant characterises this application as being in the Federal Court jurisdiction because of "…the Court's plenary superintending power over the Minister's action in administrating and enforcing the Income Tax Act, RSC 1985, c 1, which includes supervision over the Minister's conduct during collection matters."

[23] The Federal Court does have a plenary superintending power over the Minister's actions in administering and enforcing the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA] (*JP Morgan Asset Management (Canada) Inc v Canada (Minister of National Revenue)*, 2013 FCA 250 at para 69 [*JP Morgan*]). This power includes judicial review of collection measures taken by the Minister which are neither acceptable nor defensible on the facts or the law (*Walker v R*, 2005 FCA 393 at para 15 [*Walker*]; *JP Morgan*, above, at para 96).

[24] However, section 18.5 of the *Federal Courts Act* cannot be overlooked. Justice Stratas, writing for the Federal Court of Appeal in *JP Morgan*, is instructive in how to determine if there is a an adequate, effective recourse elsewhere. The Federal Court does not have jurisdiction on judicial review to determine the validity of an assessment or reassessment. Parliament gave the Tax Court of Canada of Canada exclusive jurisdiction regarding tax assessments. The Tax Court of Canada has the expertise and can hear evidence on the merits regarding assessments so the

Federal Court is unable to review assessments or reassessments (*JP Morgan* at paras 24 and 27; *Walker*, above, at para 13; *Canada v Addison & Leyen Ltd.*, 2007 SCC 33 at para 11 [*Addison*]).

[25] For the Federal Court to have jurisdiction there needs to be an administrative law claim arising from the wrongful conduct of a Canada Revenue Agency official and not a collateral attack on the validity and correctness of the assessment (*Canada (Minister of National Revenue) v Sifto Canada Corp*, 2014 FCA 140 [*Sifto FCA*]). The Supreme Court of Canada in *Addison*, above, held that using judicial review to circumvent the Tax Court of Canada should only be a remedy of last resort (*Addison* at para 11).

[26] Justice Rennie (as he then was) in the Federal Court decision of *Sifto Canada Corp v Canada*, 2013 FC 986 at paragraphs 24-26 (affirmed as cited above in *Sifto FCA*, above]) said:

> 24 …The ITA itself also ensures that issues of discretion are kept separate and apart from the interpretation and application of the ITA, which is in the domain of the Tax Court, presumably on the basis that it is best not to mix questions of discretion with the interpretation and application of taxation law. To conclude, in TeleZone the Supreme Court of Canada also emphasized the importance of not conflating discreet domains of the law; paragraphs 30-33 per Binnie J.
>
> 25 The question of tax liability is within the exclusive jurisdiction of the Tax Court. Liability is to be assessed against the provisions of the ITA…
>
> 26 Undoubtedly, the Court must be vigilant in reviewing an application or statement of claim to ensure that it is not a collateral attempt, through artful pleading, to pursue a remedy or achieve a result otherwise available under the ITA. There is no doubt that the jurisdictional window for any court, other than the Tax Court, to consider matters related to the taxation is extremely limited - but it exists, nevertheless…

[27] Sifto Canada was before the Court as a result of the voluntary disclosure program that agreements were entered into regarding the United States-Canada tax convention. At the FCA level, Justice Sharlow found that the Minister's exercise of discretion under subsection 220(3.1) of the ITA whether to waive or cancel a penalty was within the jurisdiction of the Federal Court (*Sifto FCA* at para 23).

[28] With Justices Rennie and Sharlow's words in mind, each step of the decision in this matter will be reviewed as to whether it was an exercise of discretion or the interpretation and application of the ITA.

B. *Jurisdiction of Federal Court Regarding a Requirement to Pay*

[29] In *McCaffrey v Canada*, [1992] FCJ No 1108, 59 FTR 12 [*McCaffrey*], the applicant sought certiorari to set aside a requirement to pay. The Court ruled that by asking for declaratory relief they were in fact challenging the underlying assessments which generated the requirement to pay. To do so was tantamount to setting aside the assessments which is something the Federal Court has no jurisdiction to do according to section 18.5 of the *Federal Courts Act*. The trial judge relied on *Optical Recording Corp v Canada*, [1991] 1 FC 309 [*Optical Recording*], where the Federal Court of Appeal found that a taxpayer can only challenge the validity of an assessment or reassessment before the Tax Court of Canada and the Federal Court lacked jurisdiction to hear the motion.

[30] Justice Gibson echoed the finding in *McCaffrey*, above, stating that "[i]t is clear that the claim for wrongful seizure, in the sense that the seizure was without legal justification, cannot be

adjudicated by this Court by operation of section 18.5" (*Albion Transportation Research Corp v R*, [1998] 1 FC 78 at para 30). He goes on to find that this type of attack is really an attack on the assessments of which an appeal to the Tax Court of Canada is the proper alternative.

[31] In *Optical Recording*, above, Justice Urie, writing for the court, set aside a decision of the trial judge that quashed the assessment, two requirements to pay, the section 233 certificate, and prohibited the Minister from continuing collection proceedings. He found that it did not matter if the assessments were moot. The Federal Court had no jurisdiction to hear the matter. Parliament intended the Tax Court of Canada to have jurisdiction although the Federal Court could review the legality of the collection policy.

[32] But recently in *Johnson v Canada (Minister of National Revenue)*, 2015 FCA 51 [*Johnson*], Justice Webb found that the Federal Court has jurisdiction to consider the validity of a requirement to pay based on the timing of an assessment (*Johnson*, above, at paras 43-48).

[33] On our facts, the validity of the assessments is not at issue. It is the timing of the requirement to pay and the reasonableness of the Minister's ongoing refusal to re-appropriate this money which is the core of the judicial review. For these reasons, the Federal Court has jurisdiction in these collection matters.

C. *Standard of Review*

[34] Neither party provided argument regarding the appropriate standard of review. In *Clover International Properties (L) Ltd v Canada (Attorney General)*, 2013 FC 676 [*Clover*

International], the issue was the interpretation and application of section 221.2 and subsection 164(1) of the ITA. The Court found these extricable questions of law to be reviewable on a standard of correctness.

[35] I do not find the issue before me to be an extricable question of law. Rather, it is the Minister's ongoing discretionary decision not to re-appropriate funds seized in December, 2009. The timing of when matters occurred is purely factual. The standard of review for Ministerial discretion is reasonableness.

[36] The applicability of the reasonableness standard can be confirmed by following the approach discussed in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]. As the Supreme Court of Canada noted in that case, at paragraph 53, "[w]here the question is one of fact, discretion or policy, deference will usually apply automatically". Since a decision by the Minister under section 221.2 is discretionary, the deferential standard of reasonableness applies. By necessity, the Minister's decision whether to re-appropriate or not involves the Minister "interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, above, at para 54). This factor, too, confirms that the applicable standard is reasonableness.

D. *Validity of the Requirement to Pay*

[37] The Minister cannot take any collection actions against a taxpayer until the taxpayer is assessed. In order for an assessment to be complete, the taxpayer must receive notice of that assessment (ITA s.152(2)). The timing of the assessment and its mailing are critical. In addition,

the Minister cannot begin collection action until at least 90 days after the assessment in order to give the taxpayer an opportunity to object to the assessment. The taxpayer can also ask the Minister or Tax Court of Canada for an extension of time to object which cannot exceed one year and 90 days (ITA s.166.1(7)(a) and 166.2(5)(a)).

[38] The Respondent argues that the consent order by the Tax Court of Canada did not determine the validity of the relevant years' assessments on which the RTP was based. It is submitted that the consent order only agreed to an extension of time to file the notices of objection and that the RTP was based on valid assessments. Cybernius' position is that the judgment confirms that the notices of objection for the relevant years (filed March 20, 2014) are valid. Their position is that the only logical conclusion that follows is that the notices of assessment for those years had not been given to the Cybernius when CRA alleged it had and that is why the Notice of Objections filed years later were found to be valid.

[39] It follows then when Cybernius says that collection action was barred until 90 days after notice of the assessment is sent to the taxpayer (ITA s.225.1.1(c) or 90 days from the Notice of Objection is sent by the taxpayer that the Minister has confirmed or varied the assessment (ITA s.225.1(2)). Thus the collection was not valid as there were no assessments. Further, Cybernius argues the objections were valid resulting in the Minister's reassessment of the relevant years on June 26, 2015.

[40] There are considerable differences between the parties' interpretation of the Tax Court of Canada consent judgment. However, any disputes regarding the Tax Court of Canada judgment are not within my jurisdiction as this is the purview of the Federal Court of Appeal.

[41] The consent judgment states:

> The Application for an order extending the time within which a notice of objection to assessments for the 2004 and 2005 taxation years and to a reassessment for the 2003 taxation year is quashed, without costs, and accordingly, the Applicant's notice of objection to the assessments, filed March 20, 2014, is a valid of notice of objection to the assessments filed on that day.

[42] A plain reading of the Tax Court of Canada consent judgment sets the date of the notices of objections for 2004 and 2005 to be March 20, 2014. From the evidence on the record there was a notice of objection also filed for the 2003 tax year at the same time as the others so for all those years the date is March 20, 2014. Reassessments for those years were completed on June 26, 2015.

[43] In the reassessments of June 2015, the Minister said the tax credits could not be refunded because Cybernius had not filed their corporate tax returns within three years from the end of each tax year.

[44] Now to look at the timing of the collection action. The Minister took collection action on December 22, 2009, by way of a RTP. The Minister is barred from taking collection action for at

least 90 days after the day on which a notice of assessment was sent (ITA s.225.1(1.1)(c)):

Collection restrictions

225.1 (1) If a taxpayer is liable for the payment of an amount assessed under this Act, other than an amount assessed under subsection 152(4.2), 169(3) or 220(3.1), the Minister shall not, until after the collection-commencement day in respect of the amount, do any of the following for the purpose of collecting the amount:

(a) commence legal proceedings in a court,

(b) certify the amount under section 223,

(c) require a person to make a payment under subsection 224(1),

(d) require an institution or a person to make a payment under subsection 224(1.1),

(e) [Repealed, 2006, c. 4, s. 166]

(f) require a person to turn over moneys under subsection 224.3(1), or

(g) give a notice, issue a certificate or make a direction under subsection 225(1).

Restrictions au recouvrement

225.1 (1) Si un contribuable est redevable du montant d'une cotisation établie en vertu des dispositions de la présente loi, exception faite des paragraphes 152(4.2), 169(3) et 220(3.1), le ministre, pour recouvrer le montant impayé, ne peut, avant le lendemain du jour du début du recouvrement du montant, prendre les mesures suivantes :

a) entamer une poursuite devant un tribunal;

b) attester le montant, conformément à l'article 223;

c) obliger une personne à faire un paiement, conformément au paragraphe 224(1);

d) obliger une institution ou une personne visée au paragraphe 224(1.1) à faire un paiement, conformément à ce paragraphe;

e) [Abrogé, 2006, ch. 4, art. 166]

f) obliger une personne à remettre des fonds, conformément au paragraphe 224.3(1);

g) donner un avis, délivrer un certificat ou donner un ordre, conformément au paragraphe 225(1).

Collection-commencement day

(1.1) The collection-commencement day in respect of an amount is

(a) in the case of an amount assessed under subsection 188(1.1) in respect of a notice of intention to revoke given under subsection 168(1) or any of subsections 149.1(2) to (4.1), one year after the day on which the

Jour du début du recouvrement

(1.1) Le jour du début du recouvrement d'un montant correspond :

a) dans le cas du montant d'une cotisation établie en vertu du paragraphe 188(1.1) relativement à un avis d'intention de révoquer l'enregistrement délivré en vertu du paragraphe 168(1) ou l'un des

notice was mailed;

(b) in the case of an amount assessed under section 188.1, one year after the day on which the notice of assessment was sent; and

(c) in any other case, 90 days after the day on which the notice of assessment was sent.

paragraphes 149.1(2) à (4.1), un an après la date de mise à la poste de l'avis d'intention;

b) dans le cas du montant d'une cotisation établie en vertu de l'article 188.1, un an après la date d'envoi de l'avis de cotisation;

c) dans les autres cas, 90 jours suivant la date d'envoi de l'avis de cotisation.

[45] Even though this is in dispute if it is assumed the assessment dated December 18, 2006, and the reassessment on November 19, 2009, are valid (as jurisdictionally their validity cannot be at issue), the RTP on December 22, 2009, was statute barred since it was within 90 days of the reassessment.

[46] If this analysis is incorrect, the RTP was still statute barred because of objections filed and found to be valid by the Tax Court of Canada, on March 20, 2014. Under section 225.1(2) of the ITA, the Minister cannot take collection action until more than 90 days after the day on which the Minister confirms or varies the assessment if a notice of objection is filed:

> If a taxpayer has served a notice of objection under this Act to an assessment of an amount payable under this Act, the Minister shall not, for the purpose of collecting the amount in controversy, take any of the actions described in paragraphs (1)(a) to (g) until after the day that is 90 days after the day on which notice is sent to the taxpayer that the Minister has confirmed or varied the assessment.

[47] The Minister's discretion to retain these tax credits is made unreasonable when the basis for this decision is statute barred.

E. *Reasonableness*

[48] The finding above should be reason enough to grant this application but if I am wrong regarding the RTP, I find the decision not to grant the re-appropriation to be further unreasonable given that the decision was part of a continuous course of conduct and Cybernius became fully compliant during this time.

[49] The late filing of T2 corporate income tax and GST returns has been Cybernius' responsibility and they have not assisted themselves in this long running taxation dispute. But a relatively painless favorable resolution is available to both parties.

[50] *Clover International* held that section 164 of the ITA cannot be used by a corporation to have money refunded. On the facts before me, unlike in *Clover International*, there has not been an overpayment as anticipated in subsection 164(7). This money cannot be refunded to the corporate tax payer but it certainly can be re-appropriated to pay the payroll source debt.

[51] Cybernius relies on section 221.2(1) of the ITA as the basis for the Minister to set-off the payroll source debt with the credit that was collected from the invalid RTP. This section reads as follows:

Re-appropriation of amounts	**Réaffectation de montants**
221.2 (1) Where a particular amount was appropriated to an amount (in this section referred to as the "debt") that is or may become payable by a person under any enactment referred to in paragraphs 223(1)(a) to 223(1)(d), the Minister may, on application by the person, appropriate	221.2 (1) Lorsqu'un montant est affecté à une somme (appelée « dette » au présent article) qui est ou peut devenir payable par une personne en application d'une loi visée aux alinéas 223(1)a) à d), le ministre peut, à la demande de la personne, affecter tout ou partie du montant à une autre somme qui

the particular amount, or a part thereof, to another amount that is or may become payable under any such enactment and, for the purposes of any such enactment,	est ou peut devenir ainsi payable. Pour l'application de ces lois :
(a) the later appropriation shall be deemed to have been made at the time of the earlier appropriation;	a) la seconde affectation est réputée effectuée au même moment que la première;
(b) the earlier appropriation shall be deemed not to have been made to the extent of the later appropriation; and	b) la première affectation est réputée ne pas avoir été effectuée jusqu'à concurrence de la seconde;
(c) the particular amount shall be deemed not to have been paid on account of the debt to the extent of the later appropriation.	c) le montant est réputé ne pas avoir été payé au titre de la dette jusqu'à concurrence de la seconde affectation.

[52] Section 221.2(1) provides the Minister the discretion to re-appropriate amounts if the tax payer does not have any outstanding returns. The court confirmed at the start of the hearing that Cybernius filed the T2 return for 2014 and filed the RC431 Form requesting re-appropriation in October 2015 to request the Minister to exercise their discretion. Post-hearing another request for re-appropriation was made by Cybernius without prejudice to their position that the collection was done "illegally" but no further action has been reported to the Court.

[53] Given that Cybernius is fully compliant, it is unreasonable for the Minister not to exercise their discretion to ensure the collection of the payroll source debt by using an existing tax credit. It would be counter to the purpose of the ITA for the Minister to do so, especially given the importance of source deductions in a number of Acts of Parliament.

[54] The strongest support for the unreasonableness of the Minister's discretionary refusal is Justice Urie writing for the Federal Court of Appeal in *Optical Recording* at paragraph 27. Although in a slightly different context the proposition still stands:

> The power which he is so given is to ensure that payment of the indebtedness by the debtor is ultimately secure. Normally the security provided would be monetary in nature. But the Minister's power is not limited to the statutory power to take security of that nature. He is empowered by virtue of his office, to manage his department, not exclusively from an administrative point of view but also from the point of view of what has in England been described as "management of taxes" which **I take it means that as a creditor he has the right to arrange payment for a tax indebtedness in such a manner that best ensures that the whole will ultimately be paid.** For example, if insistence on payment in full when due might jeopardize the solvency of the taxpayer, with consequent loss of potential for payment in full, and if the taxpayer can continue in business by giving him time to pay, in his discretion the Minister might arrange for payment in instalments with such security, if any, as he deems necessary. **Effectively, such a course protects the Revenue and, as well, the taxpayer's solvency and continued ability to pay taxes. It applies too to the taxpayer satisfying the Minister in Part VIII tax situations that the taxpayer will eliminate its liability by year end. Such a course of conduct ought to be encouraged, not discouraged.**
>
> [Emphasis added]

[55] Having the tax debt paid is of utmost importance and the Minister has the discretion to make an arrangement to get it paid that may assist the taxpayer. In the end what matters is that the tax is paid.

[56] I will grant the application and have the matter sent back to be re-determined by the Minister. I will not grant the other relief sought by Cybernius (*Federal Courts Act*; *Johnson* at paras 62-63).

F. *Costs*

[57] Costs were sought by Cybernius on a solicitor-client basis because of the Crown's attempt to re-litigate the Tax Court of Canada consent judgement. The Respondent was "shocked" that Cybernius would seek costs on a solicitor-client basis as a judicial review is not the place for damages and Cybernius' compliance with filings had only just been relayed to counsel. For these reasons, the Respondent seeks costs on an elevated basis.

[58] This matter came before the Court in no small part due to Cybernius' lack of compliance. I see no reason to order solicitor-client costs to Cybernius. However, they were successful on the application and for that reason I will award them a lump sum of $1,000.00 to be payable forthwith by the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is granted and the matter is sent back to be re-determined.

2. Costs of $1,000.00 are ordered to be paid forthwith by the Respondent to the Applicant.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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