Federal Court  Cour fédérale

Date: 20190703

Docket: T-1024-16

Citation: 2019 FC 887

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 3, 2019

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

GARDY MASSON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant, Gardy Masson, is seeking judicial review of a decision rendered on June 2, 2016, by a representative of the Minister [Minister's representative] at the Canada Revenue Agency [CRA]. In that decision, the Minister's representative denied his request for late election submitted under subsection 85(7.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA].

[2] For the reasons presented below, the application for judicial review is dismissed.

II. Background

[3] On September 15, 2008, Mr. Masson sold four of his properties to the corporation 9200-5222 Québec Inc. [Corporation], of which he is the sole director, officer and shareholder. He sold a fifth property to the Corporation on October 27, 2008.

[4] After an audit that began in 2012 for the 2008 to 2011 taxation years inclusively, the Agence du revenu du Québec, Quebec's revenue agency [ARQ], sent Mr. Masson a draft assessment dated December 3, 2014, to take into consideration the unreported taxable capital gain generated by the sale of the five properties to the Corporation.

[5] At a meeting on January 12, 2015, Mr. Masson's representatives asserted to the ARQ that Mr. Masson had intended to proceed with a tax rollover when the property was sold, but an error had been made by Mr. Masson's former accountant in posting the transactions in the Corporation's books. Despite Mr. Masson's arguments and those of his representatives, the ARQ upheld the draft assessment and issued a notice of reassessment on April 23, 2015, for a taxable capital gain of $117,573 resulting from the sale of the properties.

[6] On May 4, 2015, as part of an information exchange program between the tax authorities, the ARQ sent its audit report to the CRA.

[7] Following audits, the CRA issued a notice of reassessment on August 13, 2015, which included the taxable capital gain generated by the sale of the properties to the Corporation. On September 29, 2015, Mr. Masson filed a notice of objection against this notice of reassessment. In a letter sent to the CRA's objections division, Mr. Masson's representatives reiterated that the additional income for 2008 was a result of a tax rollover under section 85 of the ITA that had not been performed according to the conditions of the Act due to the actions of Mr. Masson's former accountant and asked for a rectification of the rollover to negate the capital gain resulting from the transfer. They enclosed with the letter a copy of the demand letter sent to the former accountant.

[8] On February 8, 2016, a CRA appeals officer asked Mr. Masson and his representatives to send her the T2057 form and pay the penalty so that the rollover request under subsection 85(1) of the ITA could be analyzed. The CRA received the T2057 form and a cheque for $8,000 on February 23, 2016. Only three of the five buildings were mentioned in the request for late election filed by the applicant, as the others had not generated any gains.

[9] After analyzing the request in accordance with subsection 85(7.1) of the ITA, the Eastern Quebec Tax Services Office auditor [auditor] recommended denying Mr. Masson's late election request. On May 26, 2016, the Minister's representative met with the auditor to discuss her recommendation. During this meeting, the Minister's representative received all of the supporting documents for the recommendation.

[10] On June 2, 2016, the Minister's representative signed the auditor's working papers and denied Mr. Masson's late election request. The working papers indicate that the decision was based on the following factors: (1) the sales contracts did not contain any clauses allowing for a rollover under subsection 85(1) of the ITA; (2) the Corporation's financial statements as at March 31, 2009, do not mention the acquisition of property for the agreed amount of the late election, and there was no Schedule 8 for the depreciable property acquired; and (3) no documents such as the Corporation's minutes were provided to the ARQ auditor despite several requests to this effect. The Minister's representative sent a letter that same day to Mr. Masson informing him that his request was denied.

[11] Mr. Masson is seeking judicial review of that decision. He submits that the Minister's representative did not conduct an objective analysis of the facts or all of the evidence before denying the late election. He alleges that the Minister's representative did not consider the false representations and errors of his former accountant and the notary's inaction. Lastly, Mr. Masson argues that there are often technical errors when bills of sale are drawn up and that the request for late election was merely intended to reflect the true intention of the parties at the time of the sale of the properties, which was to proceed with a rollover under subsection 85(1) of the ITA.

[12] After reviewing the record, the Court finds that the only issue in dispute is whether it was reasonable for the Minister's representative to deny Mr. Masson's late election under subsection 85(7.1) of the ITA.

III. Analysis

[13] Section 85 of the ITA allows a taxpayer to transfer an eligible property to a taxable Canadian corporation while delaying, in whole or in part, the taxation of the gain accrued on the property, as long as this election is made using the prescribed form [T2057], within the time provided, and the consideration received by the transferor for the property transferred to the corporation includes shares of the capital stock of that corporation.

[14] Under subsection 85(6) of the ITA, the election must be made on or before the day each of the parties to the property transfer is required to file a tax return for the taxation year in which the transfer occurred.

[15] Under subsection 85(7) of the ITA, the transferor and transferee of the transferred property may request that the prescribed form be accepted late if it is filed in the three years following the deadline established in subsection 85(6) of the ITA for filing their election in the prescribed form, and if the prescribed penalty is paid at the same time.

[16] In accordance with subsection 85(7.1) of the ITA, the Minister of National Revenue [Minister] may allow an election to be made after the three-year deadline following the date the election was required to be made if the Minister is of the opinion that the circumstances of the case are such that it would be just and equitable to allow the late election, that the election was made according to the prescribed form, and that the estimated amount of the penalty has been paid.

[17] In order to guarantee that applications under subsection 85(7.1) of the ITA are processed fairly and uniformly, the CRA has adopted guidelines to assist the Minister's representatives when exercising their power. These guidelines are set out in Information Circular IC76-19R3, entitled "Transfer of Property to a Corporation Under Section 85".

[18] The decision to accept the late election or not is discretionary and requires the Minister's expertise in applying the provisions of the ITA to the facts of the case (*S Cunard & Company Limited v Canada (Attorney General)*, 2012 FC 683 at paras 31, 34 [*Cunard*]; *Bugera v Canada (Minister of National Revenue)*, 2003 FCT 392, [2003] FCJ No 553 at para 14 [*Bugera*]). As a result, the applicable standard of review is reasonableness (*Cunard* at para 34).

[19] When the reasonableness standard applies, the role of the Court is to determine whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". If "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility", it is not open to this Court to substitute its own view of a preferable outcome (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14–18 [*Newfoundland Nurses*]).

[20] In the present case, the Minister's representative could reasonably have denied Mr. Masson's late election. Even though the June 2, 2016, letter does not give any reasons, the auditor's report, which was signed by the Minister's representative, sufficiently explains the

reasons for which Mr. Masson's request was denied (*Hi-Tech Seals Inc v Canada (Attorney General)*, 2009 FC 901 at para 24).

[21] First, Mr. Masson acknowledged that the deeds of sale transferring the properties to the Corporation do not contain any clauses allowing for a rollover under subsection 85(1) of the ITA or indicating the intention to proceed in this manner. Indeed, there are no clauses stipulating that shares will be issued in consideration for the transfer of the property, that the prescribed forms under subsection 85(1) of the ITA will be signed by the parties to the deeds or that the parties undertake to fulfil the conditions required for a rollover.

[22] Moreover, Mr. Masson admitted that the Corporation's balance sheets for the fiscal years ending March 31, 2008, and March 31, 2009, do not reflect a transfer of property according to subsection 85(1) of the ITA and do not indicate any changes with respect to the numbers of shares held by Mr. Masson.

[23] Mr. Masson also acknowledged that none of the Corporation' minutes or resolutions were given to the ARQ or the CRA auditors to show the initial intention to proceed with a rollover at the time of the transfer, or to support the request for the late election.

[24] Lastly, Mr. Masson admitted that there was no change in the number of shares he held in the Corporation during this period, despite the requirement in subsection 85(1) of the ITA that consideration must include at least one share (or fraction of a share) of the capital stock of the Corporation.

[25] Mr. Masson submits that the CRA should nonetheless have considered the errors, acts and/or omissions of the advisor representing him at the time of the transfer and the inaction of the notary who should have warned him of the disastrous consequences of the transactions. Mr. Masson stated that his intention had always been to proceed with a rollover and that it was not an aggressive tax planning strategy. He did not know what steps to take and could not know that they had not been taken. As for the lack of corporate resolutions or minutes that might show the intention to proceed with a rollover, Mr. Masson explained that his former advisor had refused to give them to him.

[26] The Court cannot agree with Mr. Masson's submissions.

[27] First, it has been well established that a decision-maker is presumed to have considered all the evidence and is not required to refer to "all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" (*Newfoundland Nurses* at para 16). Additionally, the decision-maker "is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Newfoundland Nurses* at para 16).

[28] Second, the Court notes that at the time she made her decision, the Minister's representative had the ARQ auditor's report in hand. Beginning at page 27 of that report, we find a summary of the various meetings and discussions between Mr. Masson's representatives and the ARQ. On January 12, 2015, it indicates that Mr. Masson's representatives stated that there had been an error in posting the transactions in the Corporation's books and that it was

Mr. Masson's former accountant who had instructed the notary. It also notes that on April 9, 2015, Mr. Masson's representatives informed the ARQ that Mr. Masson's former accountant had not provided any documents from the Corporation that would show the initial intention was to proceed with a rollover.

[29] The Minister's representative also had a copy of the November 4, 2015, letter sent by Mr. Masson's representatives to the CRA, which states the grounds for objecting to the reassessments and includes a copy of the demand letter sent to Mr. Masson's former accountant dated July 31, 2015. Although the demand letter does not provide any support for Mr. Masson's initial intention, it specifically accuses the accountant of having made errors in his tax advice to Mr. Masson and states that the accountant's negligence and lack of cooperation in discussions with the ARQ were causing harm to Mr. Masson.

[30] Considering the documents the Minister's representative had, the Court is not persuaded that she neglected to consider the errors or omissions Mr. Masson alleges were committed by his former advisor or by the notary who performed the transfer of the properties.

[31] At any rate, this Court has consistently refused to accept that a third party's mistake—including an accountant who commits an error or ignores the ITA—constitutes a valid ground for an application for judicial review. Recourse exists against this third party, not against the CRA (*Quastel v Canada Revenue Agency*, 2011 FC 143 at para 29; *Babin v Canada (Customs and Revenue Agency)*, 2005 FC 972 at paras 12, 20–21; *Tadross v Canada (Minister of National*

Revenue), 2004 FC 1698 at paras 10–11; *Légaré v Canada Customs and Revenue Agency*, 2003 FC 1047 at para 10).

[32] The refusal to allow the applicant's late election is based on the lack of evidence establishing the parties' intention at the time of the transfer to proceed with a rollover. On several occasions, Mr. Masson's representatives asserted to the ARQ auditors that they had evidence showing the initial intention to proceed with a rollover. This evidence was never provided, and this lack of evidence was noted by the CRA auditor on April 19, 2016, in her working papers.

[33] Mr. Masson included with his application for judicial review exhibits M-1 and M-3. These were not submitted in support of an affidavit. Although inadmissible on the ground that they were not presented to the decision-maker and it was not shown that they fall within the few recognized exceptions according to *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, the Court notes that Exhibit M-3 consists of written resolutions dated September 9, 2015, and October 5, 2015, that state that [TRANSLATION] "the Corporation, from its incorporation [on April 25, 2007] to today, has never recorded in writing the decisions made regarding its organization and its operations and transactions", that the [TRANSLATION] "Corporation has never used minute books, nor has it recorded in writing any resolution whatsoever with regard to its organization", that [TRANSLATION] "the Corporation has not adopted any written resolutions in lieu of corporate resolutions" and [TRANSLATION] "that, in consideration of the above, it is relevant to adopt regularization resolutions". This attempt to supplement the record merely confirms there is a lack

of evidence showing the initial intention to proceed with a tax rollover and the reasonableness of the decision.

[34] At the judicial review hearing, counsel for Mr. Masson agreed that there was no evidence on the record pointing to Mr. Masson's initial intention and emphasized the absence of a valid or logical reason that could explain why a taxpayer would proceed with a straightforward sale when the rollover mechanism exists and is legal.

[35] Despite the persuasiveness of this argument, the Court may not exercise the discretionary power conferred on the Minister (*Bugera* at para 14, repeated in *Cunard* at para 31). Mr. Masson had the burden of persuading the Minister's representative that the circumstances of his case were such that it would be just and equitable to allow a late election. Considering that no evidence was presented to show the initial intention to proceed by rollover under subsection 85(1) of the ITA and that the errors of a third party do not constitute circumstances that justify a late election, it was open to the Minister's representative to exercise her discretion to deny Mr. Masson's late election.

IV. Conclusion

[36] To conclude, the Court finds that the decision to deny the late election was reasonable because it is within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at para 47). The application for judicial review is therefore dismissed with costs in favour of the respondent.

JUDGMENT in T-1024-16

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. Costs are awarded in favour of the respondent in accordance with Column III of Tariff B of the *Federal Courts Rules*, SOR/98-106.

"Sylvie E. Roussel"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICIROTS OF RECORD

DOCKET:	T-1024-16
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