Federal Court  Cour fédérale

Date: 20191114

Docket: T-984-18

Citation: 2019 FC 1433

Ottawa, Ontario, November 14, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

BARRY HOLLAND

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an appeal of a Prothonotary's order. Following a motion to strike by the Attorney General of Canada, the Prothonotary struck the Application filed by Mr. Barry Holland ("the Applicant") seeking Judicial Review of a Canada Revenue Agency ("CRA") decision that he was a resident of Canada for income tax purposes from 2003 to 2010.

[2] For the reasons that follow, I will dismiss this appeal.

II. Facts

A. *Background*

[3] The Applicant is a Canadian citizen. He moved from Canada to Chad in 2003. From November 2003 until December 2006, the Applicant says he assumed residency in the Republic of Chad and possessed a residency card issued by the Government of Chad. He only spent a small number of days in Canada during this stretch.

[4] Next, from 2007 until January 2010, the Applicant says he lived in Iraq and possessed a residency card issued by the Iraqi government. He worked for a South African military contractor in Iraq from spring 2007 until January 2010, when he returned to Canada.

B. *Interactions with the CRA*

[5] On July 3, 2015, the Applicant filed a Voluntary Disclosure Application to the CRA. In October 2015, he filed tax returns for 2004 and 2010-2014 as well as his forms 1161 (List of Properties by an Emigrant of Canada), 1243 (Deemed Disposition of Property by an Emigrant of Canada), 2061 (Election by an Emigrant to Report Deemed Dispositions of Taxable Canadian Property and Capital Gains and/or Losses Thereon) and NR73 (Determination of Residency Status (Leaving Canada)). He has not submitted tax returns for 2005-2009.

[6] The CRA sent the Applicant a letter dated March 3, 2016 to inform him that he was a "factual resident following [his] departure from Canada on June 30, 2004." The Applicant followed up several times with the CRA to dispute whether he was a resident of Canada during that time period. On April 25, 2018, the Minister confirmed its position, stating that the "situation remains unchanged" and attached the March 3, 2016 letter.

C. *Judicial Review of the CRA's letter*

[7] The Applicant applied for Judicial Review of the April 25, 2018 letter. The grounds were that the determination was unreasonable and breached the duty of fairness. He sought an order of *mandamus* requiring the Minister to decide whether he was a resident of Canada.

[8] The Respondent brought a Rule 221 motion to strike the Application on August 17, 2018 arguing the determination of residence is within the exclusive jurisdiction of the Tax Court of Canada.

[9] On September 4, 2018, the Applicant brought his own motion (contingent on Respondent's motion being dismissed) for the Respondent to produce relevant materials that were before the tribunal and for an extension of time to serve his supporting affidavit.

[10] The Applicant does not yet have a decision on whether the CRA will accept his Voluntary Disclosure Application filed on July 3, 2015. Nor has he filed his income tax returns for the years in question and thus the CRA has not issued assessments for the years in question.

III. Decision under appeal (Prothonotary's order)

[11] On June 4, 2019, Prothonotary Milczynski struck the Notice of Application and dismissed the Application for Judicial Review. In detailed reasons, the Prothonotary found that the Application was premature and outside the Federal Court's jurisdiction.

[12] With respect to prematurity, the Prothonotary found that the Minister's decision regarding the Voluntary Disclosure Application, which is still outstanding, was "integrally linked" to the correspondence stating he was not a Canadian resident for the time period in question. Therefore, the Application for Judicial Review was premature because there had not yet been any exercise of discretion under subsection 220(3.1) of the *Income Tax Act*, R.S.C., 1985, c. 1 ("the Act"). Secondly, she found that it was a factual determination and not an exercise of discretion under subsection 220(3.1). The factual determination of residency could be challenged by the Applicant by him filing his income tax returns and appealing any notices of assessment to the Tax Court of Canada.

[13] In terms of jurisdiction, the Prothonotary relied on *Canada v Addison & Leyen Ltd*, 2007 SCC 33, to say that judicial review should be used as a last resort remedy and not to circumvent the Tax Court's jurisdiction, as the Tax Court is the appropriate forum for issues of residency under the Act. She therefore found that even if the Application to this Court is not premature, it is outside this Court's jurisdiction.

IV. Issue

[14] The issue is whether the Prothonotary erred in striking the Application.

V. Standard of Review

[15] The parties agree that the Prothonotary's decision is reviewable on a correctness standard (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 66). The test used by the Prothonotary on the motion to strike is if the Application for Judicial Review was "so clearly improper as to be bereft of any possibility of success" (*David Bull Laboratories (Canada) Inc. v Pharmacia Inc.*, [1995] 1 FC 588 at 600 (FCA)).

VI. Analysis

[16] The Applicant argues that even though this was merely a factual determination, he is challenging the CRA's conduct in the lead-up to a tax assessment. He says this conduct falls under this Court's jurisdiction. He says the Tax Court would be unable to review the CRA's conduct and so the proper place to challenge it must be this Court. He relies upon *Safe Workforce Ltd. v Attorney General of Canada*, 2019 FC 645, which said CRA "conduct leading up to an assessment is in the exclusive jurisdiction of this Court" (para 31).

[17] He further argues that he is not challenging the correctness of the Minister's factual determination, but rather he wants to ensure the residency decision was made fairly and based on proper reasoning. He points out that there has been no tax assessment so he cannot appeal a tax

assessment to the Tax Court thus, making the Prothonotary's view that he could go to the Tax Court an error of law. The Tax Court's jurisdiction concerns assessments and appeals of assessments, and he says his residency status determination at this stage falls outside the Tax Court's jurisdiction.

[18] He also disputes the characterization of his Application as premature. He points out that the residency letter was a "separate and distinct" decision by a "federal board, commission or other tribunal" which should be judicially reviewable by this Court under section 18 of the *Federal Courts Act*, R.S.C., 1985, c. F-7. He also notes that all decisions by the Minister involve factual conclusions, so the fact that is a "factual determination" should not make it premature.

[19] After making arguments on prematurity and jurisdiction, the Applicant says the Respondent has not met the high threshold to justify striking the Application. As noted above, the Application must be "so clearly improper as to be bereft of any possibility of success."

[20] For these reasons, the Applicant asks that the Prothonotary's order be set aside, as well as for this Court to issue an order regarding: disclosure of material before the tribunal and an extension of time to serve his supporting affidavit, so he can continue with his Judicial Review. He seeks costs for this appeal and for his prior motion.

Premature Application

[21] I agree with the Prothonotary's reasoning that the Application was premature and therefore should be struck.

[22] The "decision" under review is simply a CRA letter informing the Appellant that he is a resident for income tax purposes which is a factual determination. For individuals who are unsure about their residence status, Income Tax Folio S5-F1-C1 "Determining an Individual's Residence Status" explains:

> 1.54 Taxpayers who plan to leave or have left Canada, either permanently or temporarily, should consider completing Form NR73, Determination of Residency Status (Leaving Canada) and reviewing the information referred to in ¶1.24. Taxpayers who have entered or sojourned in Canada during the year should consider completing Form NR74, Determination of Residency Status (Entering Canada) and reviewing the information referred to in ¶1.29.
>
> 1.55 Once completed, Form NR73 or NR74, as applicable, should be mailed to the address given above or faxed to 705-671-0794. In most cases, the CRA will be able to provide an opinion regarding a taxpayer's residence status from the information recorded on the completed form. This opinion is based entirely on the facts provided by the taxpayer to the CRA in Form NR73 or NR74, as applicable. Therefore, it is critical that the taxpayer provide all of the details concerning his or her residential ties with Canada and abroad. This opinion is not binding on the CRA and may be subject to a more detailed review at a later date and supporting documentation may be required at that time.

[23] The letter sent to the Appellant regarding residency is but one component of an ongoing administrative process- the income tax assessment process. The very idea of being a resident "for purposes of the *Income Tax A*ct" infers that residence is part of a broader decision-making framework. This ongoing process will lead to other decisions, including a decision on the Applicant's pending Voluntary Disclosure Application decision and/or a discretionary decision if the Applicant eventually files a section 220(3.1) taxpayer relief request to avoid paying penalties or interest. While these decisions are reviewable, an initial residency letter should not be reviewable. This is because courts should not interfere with "ongoing administrative processes

until after they are completed, or until the available, effective remedies are exhausted" absent "exceptional circumstances" (*Canada (Border Services Agency) v* C.*B. Powell Ltd.*, 2010 FCA 61 at para 31).

[24] The only authority cited by the Applicant in his argument against prematurity is *Safe Workforce Ltd. v Attorney General of Canada*, 2019 FC 645 [*Safe Workforce*]. This case does not address prematurity but rather found that conducting an audit without awaiting adequate disclosure was CRA "conduct leading up to an assessment" which is properly reviewable (para 31). This decision was rather different from the residency letter in the present case (*Safe Workforce*).

[25] In contrast to *Safe Workforce*, Associate Chief Justice Gagné in *Ghazi v Minister of National Revenue*, 2019 FC 860 [*Ghazi*] in an application for Judicial Review alleging that CRA officers were biased, struck the Application as a veiled attack on the Tax Court's jurisdiction, noting that judicial review is a means of last resort. I find that *Ghazi*'s reasoning that it was not a "cognizable administrative law claim" that was struck is also applicable in this case.

[26] Furthermore, the Applicant's own arguments about jurisdiction confirm that his Application is premature. To try to shape the Application into this Court's jurisdiction, he acknowledges that "the Minister has not yet issued assessments for the tax years covering the CRA's Decision." Additionally, he argues that he "is not explicitly disputing the correctness of the Minister's determination that he was factually resident in Canada" and "instead the focus…is

whether the CRA's Decision, and by extension the discretionary authority of the Minister, was reasonable in the manner in which the decision was made."

[27] Despite these creative arguments, he cannot judicially review this particular tax process when there has been no assessment and no discretionary decision. These are precisely the points the Prothonotary made in finding the Application was premature.

[28] The Appellant has not filed his returns for the years in question, so it is not surprising that CRA have not done assessments.

[29] Once the assessments are issued by CRA and if the Appellant wishes to file an objection and appeal, then the Tax Court has the exclusive jurisdiction to deal with whether he is a resident of Canada or not.

[30] Allowing "premature recourse to judicial review" of preliminary residency assessments would "frustrate special schemes set up by Parliament and cause delay," as cautioned against by the Federal Court of Appeal (*Minister of National Revenue v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para 85). This Court should prevent scenarios where "someone has rushed off to a judicial review court when adequate, effective recourse exists elsewhere or at another time" (para 86).

[31] The Prothonotary correctly held that the Application for Judicial Review was bereft of success because it was premature and then struck it. I wholly adopt the reasoning of Prothonotary Milczynski and dismiss this appeal.

VII. Costs

[32] Post-hearing the parties provided the Court with a joint letter agreeing to costs being awarded in the amount of $1700.00 lump sum inclusive of fees, taxes and disbursements. I find this to be an appropriate order of costs and do so payable forthwith by the Appellant to the Respondent.

VIII. Conclusion

[33] The Prothonotary reached the correct decision by concluding that this Application for Judicial Review was premature. I therefore dismiss the appeal.

JUDGMENT in T-984-18

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed;

2. Costs in a lump sum inclusive of fees, taxes and disbursements in the amount of $1700.00 are to be paid forthwith by the Applicant to the Respondent.

"Glennys L. McVeigh"
Judge

ANNEX A – RELEVANT LEGISLATION

Income Tax Act
RSC 1985 c 1 (5th Supp)

Waiver of penalty or interest

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.

Tax Court of Canada Act
RSC 1985 c T-2

Jurisdiction

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, Part 1 of the Greenhouse Gas Pollution Pricing 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.

Loi de l'impôt sur le revenu
SRC 1985, ch 1 (5e suppl.)

Renonciation aux pénalités et aux intérêts

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.

Loi sur la Cour canadienne de l'impôt
LRC (1985) ch T-2

Compétence

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 partie 1 de la Loi sur la tarification de la pollution causée par les gaz à effet de serre, 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'oeuvre, dans la mesure où ces lois prévoient un droit de renvoi ou d'appel devant elle.

Federal Courts Act
RSC 1985 c F-7

Exception to sections 18 and 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.

Loi sur les Cours fédérales
LRC (1985) ch F-7

Dérogation aux art. 18 et 18.1

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.

Federal Courts Rules
SOR/98-106

Striking Out Pleadings

Motion to strike

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

(b) is immaterial or redundant,

(c) is scandalous, frivolous or vexatious,

(d) may prejudice or delay the fair trial of the action,

Règles des Cours fédérales
DORS/98-106

Radiation d'actes de procédure

Requête en radiation

221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

a) qu'il ne révèle aucune cause d'action ou de défense valable;

b) qu'il n'est pas pertinent ou qu'il est redondant;

c) qu'il est scandaleux, frivole ou vexatoire;

d) qu'il risque de nuire à l'instruction

(e) constitutes a departure from a previous pleading, or

(f) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

équitable de l’action ou de la retarder;

e) qu’il diverge d’un acte de procédure antérieur;

f) qu’il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l’action soit rejetée ou qu’un jugement soit enregistré en conséquence.

FEDERAL COURT

SOLICITORS OF RECORD

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