

Docket: 2023-1768(IT)I

BETWEEN:

MISBAHUDDIN HALEEM,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Appeal heard on August 12 and 15, 2024, at Calgary, Alberta
Respondent's written submissions filed on September 4, 2024.
Appellant had no further submissions.

Before: The Honourable Justice Michael U. Ezri

Appearances:

Agent for the Appellant: Sarah Haleem

Counsel for the Respondent: Kerrin Rodrigues

JUDGMENT

The appeal of the assessment of the appellant's 2019 taxation year is dismissed without costs.

Signed at Toronto, Ontario, this 8th day of October 2024.

“Michael Ezri »

Ezri J.

Citation: 2024 TCC 131

Date: 20241024

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BETWEEN:

MISBAHUDDIN HALEEM,

Appellant,

and

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REASONS FOR JUDGMENT

Ezri J.

OVERVIEW

[1] The appellant says that the Minister improperly rejected a T1 adjustment request attaching a form to opt out of Canada Pension Plan contributions. As a result, the Minister of National Revenue failed to reverse CPP contributions that had been assessed against Mr. Haleem for 2019. The actual issue here is not the correctness of the assessment, but rather whether this Court is entitled to address the Minister's rejection of the opt-out form that underpins this appeal. I find no basis to distinguish this case from reasoning of the Supreme Court in the recently decided *Dow Chemical* case. The Minister's decision to reject the opt-out form was a discretionary decision that is not justiciable in this Court. As a result, this appeal must be dismissed.

FACTS

[2] The appellant Misbahuddin Haleem did not testify in this appeal, but his daughter appeared as his agent and advised that the appellant did not dispute the Minister's assessing history or assumptions of fact which assumptions were reviewed one by one with her. The basic undisputed facts are these:

- a. Mr. Haleem was more than 65 years of age in 2019 and was in receipt of a pension under the *Canada Pension Plan*.¹
- b. Mr. Haleem nevertheless remained self employed in 2019 and reported net self-employment commission income of \$17,638 in 2019.
- c. Mr. Haleem filed his 2019 tax return on June 11, 2020.
- d. On June 30, 2020, Mr. Haleem's 2019 tax return was initially assessed (the 2020 Assessment). The Minister of National Revenue (the "Minister") assessed \$1,442.07 in CPP contributions owing in respect of the self-employment income.
- e. The appellant did not immediately object to the assessment. Instead, more than a year later on October 20, 2021, Mr. Haleem filed a T1 adjustment request to which he attached a form prescribed by regulations enacted under the CPP seeking to opt out of making CPP contributions for his 2019 year (the "CPP Form").
- f. On December 16, 2021, the Minister issued a reassessment (the 2021 Reassessment). That rather mysterious notice changed no amount on the initial assessment. It stated only that, "We changed your return to adjust CPP/QPP elective earnings." Neither the appellant's agent nor counsel for the respondent could point to any change or enlighten me on what "elective earnings" meant in that context.
- g. The appellant purported to file a notice of objection to the 2021 Reassessment on February 20, 2023.
- h. The Minister by letter dated March 22, 2023 rejected the objection on the basis that the 2021 Reassessment was not really an assessment after all but merely a notice issued for "information purposes". The Minister also advised that the notice of objection was too late to be accepted in respect of the 2020 Assessment. Instead, the Minister invited the appellant to apply for an extension of time to object to the 2020 Assessment. The Minister's letter advised the appellant that he had until June 15, 2022² to make that application.

¹ RSC 1985, c. C-8 with amendments in force as at March 3, 2020; [hereinafter, "CPP"]. The form is prescribed under the *Canada Pension Plan Regulations*, CRC c. 385.

² The appellant, ably represented by his daughter, tactfully reminded me that as a self-employed tax payer, the appellant had until June 15, 2021 to object to the 2020 Assessment since that date was the later of 90 days after the date of the 2020 Assessment and one year after the June 15, due date for the appellant's return as a self-employed

- i. On April 17, 2022, the appellant applied to extend time to object to the 2020 Assessment and attached to that application a notice of objection that was substantially similar to its February 20, 2022 notice of objection.
- j. The Minister granted the extension of time to file the notice of objection on June 8, 2022.
- k. Exactly one year later on June 8, 2023 the Minister confirmed the 2020 Assessment on the basis that she, the Minister, had no statutory authority to accept the late filed election. The CRA issued a letter on Sept 15, 2023, setting out the Minister's legal reasons for so holding.

ISSUES

[3] The issues are these:

- a. Which assessment is under appeal to this Court?
- b. Does this Court have the jurisdiction to order the Minister to reassess so as to give effect to the CPP election?
- c. If so, was the Minister correct in rejecting the CPP Election?

[4] In my view, this Court's jurisdiction to consider the rejection of the CPP Form is the issue upon which this case turns. However a consideration of the legal status of the 2020 Assessment and the 2021 Reassessment in order.

(1) Issue #1: Which assessment is on appeal before this Court

[5] Both parties argued this case on the basis that this is an appeal from the 2020 Assessment. I agree that it is, but the matter is not as clear-cut as it may at first seem.

[6] The 2020 Assessment was not wrong when first issued, and indeed the appellant did not initially challenge it. Instead, he tried to opt out of the CPP contribution requirement. It was the Minister who insisted that the appellant's notice of objection to the 2021 Reassessment be recast as an objection to the 2020 Assessment and the appellant went along with that approach.

taxpayer. The CRA could extend that time by one year to June 15, 2022 which is what it did. The appellant pointed me to *Reyes v R*, 2023 TCC 31, para 46, to the same effect.

[7] It is also arguable that the 2020 Assessment no longer exists because the 2021 Reassessment superseded the 2020 Assessment.³ If that is the case, the notice of objection would be objecting to an assessment that was nullified.

[8] However I do not think that the 2021 Reassessment nullified the 2020 Assessment. I say that for two reasons:

- a. The 2021 Reassessment did not change any amount assessed by the Minister; and
- b. The 2021 Reassessment appears to have been intended to advise the appellant of the Minister's decision to reject the T1 adjustment request. As I will explain in my jurisdiction analysis, the decision to reject the T1 adjustment request is a discretionary decision not an assessing decision and so it does not supersede the 2020 Assessment.

[9] That said, the use of the 2021 Reassessment to communicate a decision to reject a late filed election requires two further comments:

- a. Even if I had found that the 2021 Reassessment had superseded the 2020 Assessment, the appellant would still have had a valid appeal before this Court, albeit an appeal from the 2021 Reassessment, rather than the 2020 Assessment. The appellant purported to file a notice of objection to the 2021 Reassessment. It was filed in time and although the Minister purported to reject the notice of objection, the Minister did not dispose of the objection by either confirming or reassessing. So the appellant was free to appeal to the Tax Court in respect of the 2021 Reassessment 180 days after filing his notice of objection on February 20, 2023 i.e. anytime after August 19, 2023 and he in fact filed his notice of appeal on August 30, 2023; and
- b. Notices of (Re) assessment are specific documents mandated under the ITA. When sent, they put into motion the legal machinery that permits objections to assessments and appeals from assessments to this Court. It is not a good practice for the Minister to issue a document called 'Notice of Reassessment', and then when the taxpayer objects, respond, as the Minister did here, that the 2021 Reassessment was, "for information purposes only." Either the piece of paper is a notice of reassessment or it is not. If it is a reassessment, then an objection lies; if it is not a reassessment, then it should not be issued. In this case, the Minister's

³ See, *Savics v R*, 2021 FCA 56, para. 45.

actions came perilously close to depriving the appellant of his day in court by insisting that no objection could lie from the reassessment and then by inviting the appellant to object to the 2020 Assessment which could well have been viewed as superseded. It was only by luck that the appellant filed an appeal to this court that could be validly construed as either an appeal from the 2020 Assessment as confirmed by the Minister, or as an appeal from the 2021 Reassessment filed 189 days after the notice of objection to that Reassessment had been filed.

[10] By issuing a reassessment and then inviting the appellant to object to an earlier Assessment, the Minister, however inadvertently, may have misled the appellant into believing that he could address the rejection of the CPP Form in this Court when in law, any remedy would be via a judicial review application to the Federal Court. That is because the Minister's decision was a discretionary decision that is not justiciable in this Court.

(2) Issue #2: No remedy in Tax Court for rejected CPP election

(a) The Statutory Scheme as it relates to CPP

[11] The CPP is detailed and complex legislation. However, that detail can be omitted here as the matter in issue engages only three elements of the legislation:

- a. Under the CPP, self-employed persons must make contributions to the CPP on their contributory self-employed earnings⁴ which includes self-employed earnings and which self-employed earnings include income from their businesses;⁵
- b. Self-employed persons who are entitled to be paid CPP and who are over the age of 65 can make an election in prescribed manner to exclude self-employed earnings from their contributory self-employed earnings.⁶ Those who keep paying into CPP can receive additional amounts as a post-retirement benefit; and
- c. The election must be filed within one year after the due date for the income tax return for the months or year to which the election applies.⁷

⁴ CPP, subs. 10(1).

⁵ CPP, subpara. 14(a)(i).

⁶ CPP, para 13(1)(b) and para 13(1.1)(a).

⁷ CPP Reg. CRC c. 385, para 83.2(b).

[12] Mr. Haleem was receiving a CPP pension and he wanted to opt out of paying 2019 contributions. His 2019 return was due on June 15, 2020 (and filed June 11, 2020) and so he had until June 15, 2021 to opt out of paying 2019 contributions, but as indicated earlier, he only filed his form in October of 2021.

(b) Mr. Haleem's Argument about the Minister's authority to Extend Time and the Minister's Response

[13] Mr. Haleem's appeal to this Court argues that the Minister was wrong to not accept the CPP Form and as a consequence, the 2020 Assessment is wrong. The argument proposed by Mr. Haleem is that the CPP legislation incorporates by reference a number of provisions of the *Income Tax Act* (ITA). In particular, s. 36 of the CPP provides that Part XV of the ITA applies with such modifications as the circumstances require in relation to any amount payable as or on account of contributions in respect of self-employed earnings as though it were an amount payable under the ITA.

[14] The appellant argues that subsection 220(3.2) is found in Part XV of the ITA and it gives the Minister the authority to extend time to make elections under a prescribed provision. Thus argues the appellant, the Minister could have extended the time for Mr. Haleem to make his election to opt out of paying CPP contributions in 2019.

[15] The CRA in its letter of September 15, 2023 disagreed with the Appellant's position. The CRA was of the view that the CPP did not expressly permit the late filing of elections and that s. 220(3.2) of the ITA permitted extensions of time only for matters which matters were prescribed matters, i.e. contained in *Income Tax Regulation* 600. Those matters did not include CPP elections to opt out of paying pension contributions.

(c) Minister's Refusal Was Discretionary

[16] The Minister's decision that she lacked the authority to accept the late filed election is a legal conclusion. It may therefore appear to the appellant to be a decision that has to be either right or wrong and that this Court gets to decide that question once and for all. However, the branch of law known as administrative law says otherwise.

[17] Administrative law addresses issues of how government officials, administering statutes like the ITA, go about making decisions affecting the rights

and obligations of persons under those statutes. It also addresses the question of how persons affected by such decisions challenge them in court and how courts are supposed to adjudicate those disputes.

[18] *Vavilov* is now the seminal case on the question of what standard of review a court will apply to an administrative decision. In *Vavilov*, the Supreme Court explained that, all things being equal, a court will presumptively apply a reasonableness standard to all decisions of administrative decision makers.⁸ That is because Parliament intended for such decision to be made with a minimum of judicial interference.

[19] The Supreme Court in *Vavilov* explained that a reasonableness standard is distinct from a correctness standard. The reviewing court looks at the reasons given by the decision maker to determine if they are logical and coherent and not untenable. The reviewing Court is not tasked with deciding the contested matter itself.⁹

[20] Here, the Minister made a decision interpreting her authority to accept late filed elections under two enabling statutes, the CPP and the ITA.

[21] In *Banff Caribou Properties Ltd.* the Federal Court was asked to judicially review a decision of the Minister of National Revenue rejecting a taxpayer's request to amend a corporate tax return to attach letters electing to treat certain buildings as separate depreciable properties. The Minister refused to accept the amendment on the basis that it lacked the discretion to accept late filed elections under the statutory provisions in issue in that case.¹⁰

[22] The Federal Court in *Banff Caribou* held that the request to amend the tax return amounted to a request to late-file an election. The Federal Court upheld the Minister's refusal on the basis that it was reasonable under the *Vavilov* standard.¹¹

[23] The Respondent in this appeal relied on *Banff Caribou* to show that the Minister, in Mr. Haleem's case, was correct in refusing to accept the CPP Form. However, shortly before Mr. Haleem's appeal was heard, the Federal Court released

⁸ *Canada (Min of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, par. 16, 24-25.

⁹ *Vavilov*, para 83.

¹⁰ *Banff Caribou Properties Ltd v. Canada (AG)*, paras 2, and 4.

¹¹ *Banff Caribou*, para 2, 5 and 14.

a decision in the matter of *Onex Corporation*,¹² which considered but distinguished the decision in *Banff Caribou*.

[24] I rely on *Banff Caribou* only for the limited purpose of showing that decisions about whether to accept late filed elections under subsection 220(3.2) of the ITA are examples of discretionary decisions that are reviewed by the Federal Court using the reasonableness standard specified by the Supreme Court in *Vavilov*. They are not decisions that must be found to be right or wrong by this Court. I note in this regard that that *Onex* did not depart from the reasonableness standard of review mandated by *Vavilov* and applied in *Banff Caribou*.¹³

[25] Challenges to discretionary decisions about elections create a jurisdictional problem for this Court. The Tax Court's job is to decide tax assessment appeals on a correctness basis. The Supreme Court in the recent case of *Dow Chemical* applied the principles in *Vavilov* and held that this Court cannot decide questions that are reviewable on a reasonableness standard.

(d) *This Court does not adjudicate discretionary decisions even where they affect tax assessed*

[26] In *Dow Chemical*,¹⁴ the Minister had the authority under the transfer pricing provisions of the ITA to make a downward adjustment to the interest payable to Dow by a related Swiss corporation. That adjustment would have decreased the appellant's income. The Minister declined to make the adjustment and Dow appealed the resultant assessments to the Tax Court on the basis that the Minister's failure to act had the effect of creating an error in the assessment that could be adjudicated by the Tax Court.

[27] Dow argued that the Tax Court could review the Minister's decision as part of the appeal from an assessment, but the Supreme Court disagreed, stating that, "This directly contradicts the principle made clear in *Vavilov*..."¹⁵ The Supreme Court held that the Tax Court jurisdiction is limited to reviewing the correctness of an assessment. A tax assessment in turn is, "a purely non-discretionary determination of the taxpayer's liability..."¹⁶ By contrast a decision, such as the

¹² *Onex Corporation of Canada v Canada (AG)*, 2024 FC 1247.

¹³ *Onex*, paras 30-37.

¹⁴ *Dow Chemical ULC v R*, 2024 SCC 23.

¹⁵ *Dow*, para 8.

¹⁶ *Dow*, para 43, and 46

Minister's decision in *Dow*, to not apply a transfer pricing reduction, is discretionary. Only the Federal Court could review the Minister's decision.¹⁷

[28] The Supreme Court explained that discretionary decisions in tax matters are not assessments or parts of an assessment. Discretionary decisions may be based on a variety of factors not strictly set out in the tax statute, such as policy considerations.¹⁸ That kind of decision-making is not the same as the decision to assess tax which must follow the law of the tax statute.¹⁹

[29] It may be argued that while some decisions are discretionary, their impact on an assessment entails that they must be considered when this Court decides if the assessment is correct. That was the crux of Dow Chemical's argument.²⁰ The Supreme Court disagreed and characterized that argument as significantly expanding the meaning of 'assessment'.²¹

[30] The Supreme Court considered, in great detail, the consequences of allowing this Court to consider discretionary decisions of the Minister as part of its review of tax assessments. The Supreme Court expressed numerous concerns about the resulting conflicts between the different standards of review that apply to discretionary decisions as opposed to non-discretionary ones,²² and the inconsistency that would result from having discretionary decisions appealed to the Tax Court rather than having them judicially reviewed by the Federal Court of Canada.²³

[31] The above analysis leads to the conclusion that since the Minister's decision to reject the appellant's CPP Form was a discretionary decision, that decision cannot be adjudicated in this Court, even if that decision is linked to the appellant's liability to make CPP contributions.

[32] Finally, and considering one last time, the question of whether the Minister should have issued the 2021 Reassessment, the Supreme Court in *Dow* noted that a discretionary decision of the Minister will not result in a reassessment when that decision does not adjust the taxpayer's income.²⁴ Here the decision to reject the CPP

¹⁷ *Dow*, para 102.

¹⁸ *Dow*, para 50, 55

¹⁹ *Dow*, para 45-46.

²⁰ *Dow*, para 37 and 41.

²¹ *Dow*, para 57.

²² *Dow*, para 90.

²³ *Dow*, para 92 and 97.

²⁴ *Dow*, para 61.

Form should not have precipitated the 2021 Reassessment because Mr. Haleem's CPP contribution obligations were not changed by the Minister's decision.

[33] To summarize:

- a. The decision by the Minister as to her statutory authority under ss. 220(3.2) to accept the CPP Form was a discretionary decision;
- b. This Court's job is to determine whether the amount of tax assessed was correct. This Court does not adjudicate discretionary decisions of the Minister;
- c. Tax assessments can be affected by discretionary decisions of the Minister, however this does not create an avenue of appeal for this Court to review those discretionary decisions; and
- d. Discretionary decisions that do not change amounts assessed should not normally lead to the issuance of a notice of reassessment.

[34] The appellant's tax appeal challenges the Minister's discretionary decision to reject the CPP Form, but that decision cannot be adjudicated in this Court.

(3) Issue#3: Was the minister's decision to reject the late filed election correct?

[35] Since I have concluded that this Court lacks the jurisdiction to address the question of whether the Minister could or should have accepted the late filed CPP Form, I must decline to consider the merits of the Minister's decision to reject the CPP Form.

(a) The Terminal Norco Problem

[36] The Federal Court's decision in *Banff Caribou* draws heavily on a Tax Court decision in the *Terminal Norco* case on the question of whether the Minister can accept a late filed election. Having decided a late-filed election issue in *Terminal Norco*,²⁵ it may seem peculiar that this Court is now unwilling to decide a similar issue in this case. However, the election issue was an alternate argument in *Terminal Norco* and the jurisdiction of the Tax Court does not appear to have been raised by either party in that case.²⁶ I cannot rely on the approach taken in the 2006

²⁵ *Terminal Norco v R*, 2006 TCC, 139.

²⁶ *Terminal Norco*, paras 52 to 57.

Terminal Norco decision in the face of the more recent jurisprudence of the Supreme Court in *Vavilov* and *Dow Chemical* which preclude this Court from adjudicating discretionary decisions linked to tax assessments.

[37] The appellant may still be able to apply to the Federal Court for a judicial review of the Minister's decision to reject the CPP Form. I note that judicial reviews are time sensitive and he may need leave of the Federal Court to extend time for file such a judicial review application.

CONCLUSION

[38] This appeal must therefore be dismissed, without costs.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated October 8, 2024, in order to correct the underscored words.

Signed at Toronto, Ontario, this 24th day of October 2024.

“Michael Ezri”

Ezri J.

