Federal Court  Cour fédérale

Date: 20150416

Docket: T-1581-13

Citation: 2015 FC 477

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 16, 2015

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

PAVAGE ST-EUSTACHE LTÉE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Pavage St-Eustache Ltée seeks judicial review of a decision by the Canada Revenue Agency [the Agency] dated August 27, 2013, wherein the Agency allowed only part of its request for relief under section 220(3.1) of the *Income Tax Act*, RSC (1985), c 1 [ITA]. The Agency refused to cancel or waive the interest payable on a notice of reassessment for the 1996 tax year, dated May 26, 2004, that had accrued from that date.

[2] The applicant essentially argues that neither it nor its counsel received a copy of this notice of reassessment before the end of 2008 and that consequently it should not be required to pay the interest accrued on the assessed amount. It also points to a number of errors made by the Agency in its handling of the applicant's file.

[3] For the reasons that follow, the application for judicial review will be allowed.

I. Facts

[4] The applicant is part of a group of companies known as Groupe Mathers. In 1998, the Agency launched an extensive investigation of the members of the Mathers family and the different companies connected to it, including the applicant. In 1998, Marcel Kessiby, at the time the Agency contact for the Special Investigation Division, was appointed the lead investigator. After several years of investigation and negotiation, an agreement entitled [TRANSLATION] "Proposed Civil and Penal Settlement Agreement" [the Agreement] was signed on November 25, 2002, and amended on November 28, 2002, and on March 20, 2003.

[5] Further to this Agreement, the different tax debtors paid the amounts that were listed therein.

[6] However, paragraph 8 of the Agreement provided that the Agency's decision to disallow a farm loss in the amount of $1,128,454 would be upheld. As a result, a notice of reassessment was issued by the Agency on May 26, 2004.

[7] The applicant affirms that it never received the May 26, 2004, notice of assessment, and that it was unaware of its existence until the end of 2008. Despite the instructions to have copies of all notices of assessment issued further to the Agreement sent to Mr. Kessiby, and to have all correspondence related to the Agreement sent to counsel for the applicant, neither of them was informed of the notice of assessment dated May 26, 2004, before the end of 2008. Around August 2006, the applicant received a document entitled [TRANSLATION] "Statement of Arrears", showing a balance owing of $843,829.93 for the fiscal year ending December 31, 1996. The applicant sent this document to Mr. Kessiby, who told the applicant to disregard it given that a final reconciliation would be done under the terms of the Agreement dated November 25, 2002, and amended on November 28, 2002.

[8] However, starting in March 2007, the Agency began deducting and setting off amounts owed as and when money became due to the applicant. Once again, counsel for the applicant wrote to Mr. Kessiby, who responded to him in writing on May 29, 2007, that the notice of assessment dated March 21, 2007, would be reviewed based on the Agreement, and that the amount of $24,086.09 applied to the arrears would be adjusted (Exhibit E in support of the affidavit of Marcel Kessiby).

[9] On September 12, 2007, counsel for the applicant requested confirmation in writing of the adjustment that was to be made pursuant to the Agreement. On September 25, 2007, Mr. Kessiby responded to counsel for the applicant by sending him a reconciliation summary of the applicant's accounts at September 12, 2007, and took the opportunity to inform him that he would be retiring on September 28, and that all future communications would be with Réal

Barbeau or Jean-Pierre Gouin. Both the applicant and Mr. Kessiby maintain that according to the summary reconciliation provided, the balance at September 12 was $21,550.19.

[10] First, Mr. Kessiby sent the applicant pages 11 and 12 of a 13-page document (Exhibit G in support of the affidavit of Marcel Kessiby). On the pages that were sent, one can read the following (I omit the columns for each fiscal year-end):

[TRANSLATION]

Summary table of the taxes charged

Fiscal year-end	**19961231**	**19971231**	**19981231**
. . .	. . .	. . .	. . .
Revised balance at September 12, 2007	632,085.70 DR	4,648.38 DR	40,801.91 DR
Fiscal year-end	**19991231**	**20011231**	**20061231**
. . .	. . .	. . .	. . .
Revised balance at September 12, 2007	12,567.78	6,535.16	2,399.48

[11] The applicant states that it added up the numbers on the last line of the second page of this reconciliation summary, and sent a cheque for $21,550.19. In fact, this amount actually reflects the sum of the balances for tax years 1999 ($12,595.70), 2001 ($6,549.68) and 2006 ($2,404.81) as they appear on a Statement of Arrears for the period ending September 21, 2007

(Document 5 prepared by Jean Laporte). The difference represents interest accrued from September 12 to 21, 2007.

[12] At page 2 of 4 of this Statement of Arrears, one can see a balance of $633,489.80 for tax year 1996 (once again, the difference between this amount and the $632,085.70 on the reconciliation summary of September 12, 2007, probably represents the interest accrued between that date and September 21, 2007).

[13] In both cases, the applicant disregarded the balance for the 1996 tax year in the reconciliation summary, and indicated that it believed that by paying the amount of $21,550.19, it no longer owed anything further to the 2002 Agreement.

[14] Mr. Kessiby stated that he had retired believing that the balance of $21,550.19 represented the final amount owed under the Agreement.

[15] The applicant continued to receive statements of arrears every month thereafter. Several letters sent to the Agency remained unanswered, and in early 2008, counsel for the applicant contacted Jean-Pierre Gouin, Assistant Director, Enforcement Division, Tax Services Office, Laval. Claudine Vinette, formerly responsible for the Groupe Mathers file, was reassigned to the file to attempt to shed light on the issue. After several months of research, Ms. Vinette found the notice of assessment dated May 26, 2004, and sent a copy of the entire document to the applicant in November 2008. The applicant indicated that this was the first time it had seen the document.

By that time, the Agency had deducted the full amount owed to it as and when money became owed to the applicant, covering both the principal and interest accrued since 2009.

[16] On September 3, 2009, the applicant filed a request for relief in order to have the interest accrued on the assessment dated May 26, 2004, canceled or waived. On February 2, 2010, the Agency denied this request on the grounds that (i) the request for taxpayer relief was statute-barred because it concerned the fiscal year ending December 31, 1996, which was outside the 10-year timeframe; (ii) several statements of account following the notice of assessment dated May 26, 2004, had been sent to the applicant, who was therefore aware of the outstanding balance; and, (iii) paragraph 18 of the Agreement provided that the applicant agreed to waive its right to appeal and its right to make a fairness request.

[17] The applicant filed an application for judicial review of the Agency's decision. On August 21, 2011, this Court rendered judgment and dismissed the application. Justice Lemieux did not have to rule on the issue of whether the fairness request was statute-barred because during his review, the Federal Court of Appeal handed down its decision in *Bozzer v Canada*, 2011 FCA 186, which ruled in the applicant's favour. For the remainder, he concluded that the Minister's decision to reject the applicant's request for relief was reasonable because the notice of assessment dated May 26, 2004, respected the Agreement. He also found that the applicant had been sufficiently informed of the notice of assessment dated May 26, 2004, by means of the statements of arrears and other documents that had been subsequently sent. However, he did not rule on the issue of whether paragraph 18 of the Agreement prevented the applicant from making a request for relief.

[18] The applicant appealed this decision, and the Federal Court of Appeal found in its favour, without really commenting on the first judge's reasons. In its brief decision, which it handed down immediately, the Federal Court of Appeal concluded that the Agency had erred in rejecting the request for relief by basing itself on paragraph 18 of the Agreement and failing to take into consideration paragraphs 8 and 23 of that Agreement. For this one reason, it had to intervene and return the Agency's file for its reconsideration of the request for relief in light of the whole file and the Agreement.

[19] On February 11, 2013, the applicant submitted a new request for relief to the Agency, which allowed it in part.

II. Impugned decision

[20] After having taken into consideration the relevant clauses of the Agreement and all of the applicant's arguments, the Agency concluded that the interest on arrears should be cancelled or waived for the January 1, 1999, to May 26, 2004, period.

[21] However, in regard to the interest accrued after that date, the Agency determined that based on its review of the file, it could detect neither an error attributable to the Agency after the date of the reassessment dated May 26, 2004, nor an undue delay in processing the request for relief. Several statements of account subsequent to the notice of assessment dated May 26, 2004, were sent to the applicant, and no mail was returned to the Agency. On those grounds alone, no relief would be allowed for the period after May 26, 2004.

III. Issues and standard of review

[22] This application for judicial review raises the following question:

> Did the Agency take into consideration the entire file before concluding that it had not made an error in the handling of the applicant's file, and that no undue delay could be attributed to it?

[23] In its written memorandum, the applicant also argues that the notice of assessment dated May 26, 2004, was late and that the resulting claim by the Agency, presented more than three years after the end of the 1996 fiscal year, was statute-barred under subsection 152(4) of the ITA. To this, the respondent replied in its memorandum that only the Tax Court of Canada had the jurisdiction to rule on this issue. However, at the hearing, counsel for the applicant acknowledged that because the notice of assessment of May 26, 2004, stems from the Agreement, it is not statute-barred, given that the applicant agreed to it. This argument will therefore not be dealt with in these reasons.

[24] The issue raised by this application is one of mixed fact and law, as a result of which it will be reviewed under the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 47-50 and 53).

IV. Analysis

[25] On the one hand, the applicant submits that it never received the notice of assessment dated May 26, 2004. It filed the affidavits of Mr. Kessiby, Mr. Paci and Brigitte Mathers, all of whom affirm that they only learned about it at the end of 2008. On the other hand, the respondent did not submit any evidence that the notice was sent. Moreover, Form T-99A, which is an internal Agency document, and which normally precedes the issuance of a notice of assessment, is dated October 15, 2008, which is more than two years after the date of the notice of assessment. This is approximately when Ms. Vinette was trying to find it. The only explanation offered by Mr. Laporte is that the date indicated on Form T-99A could be the date it was printed rather than when it was created. With all due respect, given that one of the boxes in the notice form is reserved for the date of issuance, it would be most surprising if this date changed every time the notice is printed.

[26] Be that as it may, the respondent is prepared to acknowledge that the applicant did not receive the notice of assessment dated May 26, 2004. However, it argues that because the applicant subsequently received several statements of arrears and other documents, it was sufficiently informed about the reassessment for the fiscal year ending on December 31, 1996, and had no reason not to pay this amount in a timely manner. The respondent also argues that the Agency's conclusion that it had not made any errors in its handling of the applicant's file is reasonable, as is its conclusion that it was not responsible for any undue delay.

[27] With all due respect, I do not share the respondent's opinion, and I believe that the Agency failed to take into consideration several facts that contradict its position, as well as a certain number of errors made by the Agency in its brief analysis of the applicant's request for relief, including the following:

- the fact that Mr. Kessiby told counsel for the applicant to disregard the Statement of Arrears dated August 21, 2006, because a final reconciliation would be done to reflect the Agreement (paragraph 24 of the affidavit of Marcel Kessiby);

- the fact that the Agency issued four separate and contradictory notices of assessment regarding the Agency's refusal to consider the farm loss, including the one of February 19, 2003—which is the first one after the Agreement—allowing the applicant the farm loss;

- the fact that it took several months to track down the notice of assessment dated May 26, 2004, and to send it to the applicant;

- the fact that Mr. Kessiby informed the applicant in writing on May 29, 2007, that the sum of $24,086.09 applied to the arrears would be corrected and the assessment adjusted (Exhibit E filed in support of the affidavit of Marcel Kessiby); and

- the fact that the notice of assessment was not sent to the applicant, or at the very least the fact that Mr. Kessiby was not informed, and that it was not sent to counsel for the applicant in accordance with the instructions.

[28] With all due respect, the Agency could not simply ignore all of these circumstances and conclude that there was no error on its part.

[29] It is possible that for the Agency, its own errors are mitigated by the fact that the applicant received some statements of arrears to which neither the applicant nor its counsel reacted. However, it must weigh all of the evidence and assess the impact of the errors it made on the applicant's position.

[30] It is also possible that the Agency could conclude that at the very least, as of September 25, 2007, the applicant could not have been unaware of the balance owed for the fiscal year ending December 31, 1996, because this balance was clearly indicated on the reconciliation summary received from Mr. Kessiby. The Agency will have to weigh all of the evidence and determine whether the applicant and Mr. Kessiby made an excusable error by only taking into consideration the last line of the second page of the document appended to the letter of September 25, 2007, from Mr. Kessiby (Exhibit G filed in support of his affidavit), which is found on the last line of paragraph 10 of these reasons.

V. Conclusion

[31] In light of all the evidence, it is my opinion that it was not reasonable for the Agency to conclude that it had not made any errors in the handling of the applicant's file without analyzing the evidence against it. For these reasons, this application for judicial review will be allowed, with costs.

JUDGMENT

THIS COURT'S ORDERS AND ADJUDGES that

1. the application for judicial review is allowed;

2. the decision of the Canada Revenue Agency dated August 27, 2013, is quashed, and the file is referred back to another representative of the Agency for reconsideration of the applicant's request for relief; and

3. costs are in favour of the applicant.

"Jocelyne Gagné"
Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1581-13
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