

Federal Court



Cour fédérale

**Date: 20180508**

**Docket: T-450-17**

**Citation: 2018 FC 494**

**Ottawa, Ontario, May 8, 2018**

**PRESENT: The Honourable Mr. Justice Lafrenière**

**BETWEEN:**

**SOCIÉTÉ EN COMMANDITE SERVICES  
AUDIONUMÉRIQUES/ PAY AUDIO  
SERVICES LIMITED PARTNERSHIP**

**Applicant**

**and**

**MINISTER OF NATIONAL REVENUE**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] This application for judicial review is with respect to a Decision of the Respondent, the Minister of National Revenue [Minister], not to recommend to the Governor in Council a remission of the harmonized sales tax [HST] and related interest and penalties in the total amount of \$203,093.33 applied for by the Applicant, Pay Audio Services Limited Partnership [Pay Audio]. The issue for determination by this Court is whether the Decision is unreasonable.

[2] Pay Audio submits that the Minister fettered her discretion in denying its application for remission. It seeks an order setting aside the Decision and referring the matter back to the Minister for determination with directions that the amount applied for be remitted to Pay Audio forthwith.

[3] For the reasons that follow, I conclude that the application should be dismissed.

## II. Legislative and Policy Framework

[4] Remission orders are granted pursuant to subsection 23(2) of the *Financial Administration Act*, RSC 1985, c F-11 [FAA], which provides as follows:

### **Remission of taxes and penalties**

23 (2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty

### **Remise de taxes ou de pénalités**

23 (2) Sur recommandation du ministre compétent, le gouverneur en conseil peut faire remise de toutes taxes ou pénalités, ainsi que des intérêts afférents, s'il estime que leur perception ou leur exécution forcée est déraisonnable ou injuste ou que, d'une façon générale, l'intérêt public justifie la remise.

[5] To assist officials in their assessment of remission requests, the Canada Revenue Agency [CRA] has developed the *Guide for the Remission of Income Tax, General Sales Tax / Harmonized Sales Tax, Excise Tax, Excise Duties, or Federal Sales Tax under the Financial*

*Administration Act* [Remission Guide], which sets out the circumstances under which remission orders may be granted. The Remission Guide lists four specific factors justifying the issuance of a positive remission recommendation:

- A. extreme hardship;
- B. financial setback coupled with extenuating factors;
- C. incorrect action or advice on the part of CRA officials; and
- D. unintended results of the legislation.

[6] The Remission Guide provides that remission will likely not be recommended where “there is no evidence that financial setback was due to factors beyond the taxpayer’s control”. It further provides that “generally, all means available within the legislation should be exhausted before remission relief is considered, i.e., filing a notice of objection and/or a court appeal, or requesting any recourse under a tax convention”. It also states that each remission must be evaluated on its own merits, and that valid reasons other than the guidelines listed above may justify granting a remission order, such as a person’s compliance history, credibility, circumstances, age, and health.

### III. Facts

[7] The facts underlying this application are not in dispute.

[8] Pay Audio is a limited partnership formed pursuant to the *Ontario Limited Partnerships Act*, RSO 1990, c L 16. Stingray Digital Group Inc. [Stingray] is a limited partner of Pay Audio and is a provider of multiplatform music services and digital experiences for pay TV operators,

commercial establishments, mobile operators, and others. Pay Audio supplies digital music to cable companies located in various provinces across Canada.

[9] The digital music supplied by Pay Audio is sent to servers located on the cable companies' premises. The location of the supply of digital music services for tax purposes is determined in accordance with the location in which telecommunications signals are received, namely in the provinces where the servers to which digital music is sent are located, pursuant to paragraph 2(d) of Part III of Schedule IX of the *Excise Tax Act*, RSC, 1985, c E-15 [ETA] and to subsection 32(1) of the *New Harmonized Value-added Tax System Regulations*, SOR/2010-117.

[10] Pay Audio reported gross sales and revenues in its good and services tax [GST] returns in the amounts of \$16,620,526, \$22,648,394, \$24,684,315, and \$29,584,358 for the years 2009, 2010, 2011, and 2012 respectively.

[11] In August 2012, Pay Audio was selected by Revenu Québec for a routine audit with respect to GST, HST, and Québec sales tax. Pay Audio fully cooperated with Revenu Québec during its audit. In the course of that audit, Revenu Québec requested information relating to the location of the servers to which digital music was sent by Pay Audio. Based on information supplied by Pay Audio, the Revenu Québec auditor determined that servers for certain of its clients, including Telus, were located in Ontario. The auditor proposed audit adjustments totalling \$527,733.06 pertaining to the company's failure to remit the 8% provincial portion of the HST as required for servers determined to be located in Ontario and unremitted GST.

[12] In April 2013, representatives of Pay Audio met with the auditor and made representations in response to the proposed audit adjustments. Stingray wrote to the auditor confirming that the servers used to deliver music content to both Shaw Communications and StarChoice were “head-ended” in Alberta, rather than Ontario. Pay Audio once again provided incorrect information that servers used by Telus to receive digital music were located in Ontario. The information had erroneously been supplied to Pay Audio by an employee of Stingray who had always, in the normal course of his duties, dealt exclusively with Telus representatives in Ontario.

[13] The auditor wrote to Stingray on April 22, 2013 to confirm his acceptance that transactions related to Shaw Communications and StarChoice should not attract HST as the server was located in Alberta. He further confirmed that the proposed audit adjustments would only apply to two remaining cable companies. The auditor determined that Pay Audio was billing Telus for the GST at the rate of 5 percent on its supply of digital music services, instead of the rate of 13 percent applicable in Ontario, where Pay Audio and Revenu Québec understood the Telus servers to be located. Consequently, Revenu Québec issued an assessment on July 4, 2013 to Pay Audio corresponding to the 8 percent difference.

[14] Pay Audio did not challenge the assessment issued by Revenu Québec and paid the amount of \$232,889.32 in un-collected and un-remitted HST and related interest and penalties. Pay Audio fully expected that Telus would comply with its tax obligations and remit to Pay Audio the amount of HST it should have paid.

[15] By way of letter to Telus dated May 2, 2014, Pay Audio attempted to collect the HST that had not been previously billed and collected. Telus refused to pay the requested amount on the grounds that the servers to which the digital music was sent were located in Alberta, where HST was not applicable.

[16] Pay Audio only became aware that incorrect information regarding the location of Telus's servers had been provided to Revenu Québec on June 3, 2014, after the expiration of the time within which it could have objected to the assessment issued by Revenu Québec in July 2013. By that time, Pay Audio was precluded, pursuant to paragraph 261(2)(b) of the ETA, from requesting a rebate of payment made in error, as the payment resulted from an assessment issued pursuant to section 296 of the ETA.

[17] By letter dated December 16, 2014, Telus formally confirmed to Pay Audio that the location in which it received digital music services from Pay Audio was in Alberta.

[18] On October 29, 2014, the accounting firm KPMG transmitted to the Director of the Business Integration and Operational Programs Division of the Excise and GST/HST Rulings Directorate of the CRA [Directorate] a request on behalf of Pay Audio for a remission order pursuant to subsection 23(2) of the FAA. KPMG submits that it would be just and equitable for a remission order to be granted in light of the particular circumstances of the case. It argues that: (a) Pay Audio had consistently complied with its tax obligations and had always paid its tax debts in a timely fashion; (b) the amount of tax, interest, and penalties paid in error represented a significant shortfall that could not be re-invested by Pay Audio in revenue-generating activities;

(c) the payment resulted from an error made in good faith by an employee of Stingray on the basis of certain information available to him at that time; and (d) a refusal to remit the amount paid in error to Pay Audio would be contrary to the spirit and purpose of the ETA. Finally, KPMG cites two specific factors from the Remission Guide that support Pay Audio's request for remission: (1) financial setback coupled with extenuating factors and (2) unintended results of the legislation.

[19] CRA requested further information, which was promptly provided by KPMG. Pay Audio's case was then assigned to Ms. Karen Stirling, Senior Rulings Officer of the Directorate, who reviewed the material provided by KPMG. Ms. Stirling prepared a report [Remission Report] for the CRA Headquarters Remission Committee [Remission Committee] recommending that remission be refused. She noted that the error in over-remitting the tax at issue was not a result of Revenu Québec's incorrect actions or misleading advice, but rather an error attributable entirely to a company employee who provided inaccurate information.

[20] The Remission Report was reviewed and approved by Ms. Stirling's supervisors on September 29, 2016 and subsequently forwarded to the Remission Committee. At a meeting held on October 18, 2016, the Remission Committee considered Pay Audio's remission request and the Remission Report, and declined to recommend that a remission be granted to Pay Audio. A draft negative decision letter was then sent to the Minister's Delegate, Geoff Trueman, Assistant Commissioner of the Legislative Policy and Regulatory Affairs Branch of the CRA [Minister's Delegate].

[21] On February 24, 2017, the Minister's Delegate rendered the impugned decision refusing to recommend to the Governor in Council the remission order sought by Pay Audio. The following reasons were given:

- A. When it received the proposed reassessment from Revenu Québec for not having charged the 8 percent provincial portion of the HST after July 1, 2010, pay Audio failed to review the place of supply of each server with the result that amounts for Shaw Communications and StarChoice were removed from the final assessment, but those for Telus Communications were not even though they were "head-ended" in Alberta.
- B. Although there may be financial consequences for Pay Audio in not recovering the amount at issue, there were no circumstances beyond the company's control that would have prevented its officials from providing Revenu Québec with correct information concerning the place of supply of its own servers at the Alberta Telus Communications site.
- C. Pay Audio's failure to object to the assessment within the statutory time limits cannot be viewed as having led to an unintended result of the legislation. As well, the purpose of the remission order process is not to provide an additional avenue of appeal to replace the recourse mechanisms under the ETA.

[22] Pay Audio commenced its application for judicial review in respect of the Minister's Delegate's Decision on March 27, 2017.



IV. Issue

[23] As stated earlier, the issue for determination by this Court is whether the Decision is unreasonable.

V. Analysis

A. *Applicable Standard of Review*

[24] The Supreme Court of Canada held in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 57 [*Dunsmuir*], that an exhaustive analysis is not required in every case to determine the proper standard of review. The Court must first ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a decision-maker with regard to a particular category of question. Where the standard of review applicable to a particular question is well-settled, the reviewing court may adopt that standard of review. In this case, there is no dispute between the parties regarding the appropriate standard to be applied where the applicant alleges that the decision-maker fettered his discretion, which is reasonableness [see *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 23-25].

B. *Alleged Fettering of Discretion*

[25] Pay Audio submits that all those involved in the decision-making process filtered the facts presented by Pay Audio through the lens of the four specific grounds for relief set out in the

Remission Guide. In doing so, they failed to give effect to the broad and equitable intent of section 23 of the FAA and flouted the CRA's own policy.

[26] Pay Audio submits that while it is not improper for an agency charged with the administration and enforcement of a legislative scheme to formulate general administrative policies to guide the decision-making process, these policies cannot be treated as binding or justify the exclusion of relevant factors from the decision-making process. According to Pay Audio, the Decision was based solely on its failure to fall within the narrow factors listed in the Remission Guide.

[27] Pay Audio submits that no other factor or circumstance appears to have been seriously considered by the Minister or her delegates in their analysis of Pay Audio's request. Pay Audio maintains that the Decision as well as the entirety of the Minister's Record was tainted by the Minister's Delegate's misapprehension of the scope of the Minister's discretion and a failure to assess the facts presented outside of the limits set by the Remission Guide.

[28] Pay Audio submits that if the Minister's Delegate had properly appreciated the broad scope of the discretion afforded by section 23 of the FAA, he would have taken into consideration general principles of fairness in his analysis of the remission request in addition to the guidelines outlined in the Remission Guide. According to Pay Audio, the Minister failed to consider that the error made in good faith by Pay Audio when providing information to Revenu Québec during its audit constituted an extenuating circumstance justifying a positive remission recommendation. Pay Audio claims that it could not have become aware of the error until

approximately a year later, after Telus refused to pay the requested amount of HST. By the time Pay Audio received the correct information from Telus and subsequent verifications were completed, no legal recourse other than a request for a remission order was available to Pay Audio in order to recover the amount paid in error.

[29] Pay Audio also contends that the Minister's Delegate ignored Pay Audio's credibility and the fact that it has always complied, without fault, with its fiscal obligations and failed to take into account that Pay Audio was never legally required to pay the amount of HST and related interest and penalties determined pursuant to Revenu Québec's assessment.

[30] Contrary to Pay Audio's assertions, the Decision demonstrates that the Minister's Delegate took into account all of the facts and circumstances identified by KPMG. All four factors set out in the Remission Guide, beyond the two identified by KPMG, were taken into consideration. Moreover, the Minister's Delegate was fully aware of the facts that gave rise to the assessment by Revenu Québec and recognized that an honest error had been made by Pay Audio. Nonetheless, he concluded that none of the factors set out in the Remission Guide applied and that no other circumstance raised by Pay Audio militated in favour of a positive recommendation.

[31] The Minister's Delegate provided cogent reasons for the Decision. He noted that representatives of Pay Audio had carefully reviewed the location of its clients' servers during the audit carried out by Revenu Québec and despite this, failed to properly identify the location of

the Telus servers. The Minister's Delegate concluded that he could not recommend the issuance of remission order based solely on an error by Pay Audio.

[32] The Minister's Delegate was alive to the fact that the over-remittance could have a financial impact on Pay Audio, but concluded that no mitigating circumstances, beyond Pay Audio's control, had been established for its failure to provide correct information to the Revenu Québec auditor.

[33] Pay Audio submits that a crucial consideration in this case is that the amount paid by the Applicant was never "legally" payable to Revenu Québec and was paid instead as a result of an innocent error made in good faith. According to Pay Audio, refusal to remit the amount paid is nothing short of unjust enrichment to the Minister at the expense of a taxpayer. This argument is without merit. Pay Audio's failure to challenge the assessment rendered the amount for which it seeks a remission legally payable despite the error. Under subsection 299(4) of the ETA, an assessment is deemed valid and binding unless otherwise vacated on objection, appeal, or reassessment. It is not open to Pay Audio to question the legality of the assessment as the time limit for objecting has long expired.

[34] Pay Audio submits that the Minister's Delegate fundamentally misunderstood or misinterpreted a material ground for relief raised by KPMG, with the result that his analysis of the remission request is flawed and incomplete. According to Pay Audio, KPMG did not take the position that the failure to object to the assessment within the prescribed time limit resulted in an unintended effect of legislation. Rather, their position was that Pay Audio was effectively being

forced to bear the cost of a value-added tax for which only the end-users would normally be liable. The failure by the Minister to correct the situation therefore led to a result that was not intended by the ETA, contradicting its spirit and purpose.

[35] I agree that Pay Audio's submission was mischaracterized by the Minister's Delegate. It remains that the over-remittance in this case was a consequence of Pay Audio's failure to provide correct information during the audit. It had nothing to do with the effect of the legislation, which was applied as intended.

[36] The Minister's Delegate concluded that the fact that Pay Audio did not discover the error, coupled with its failure to object to the assessment within the prescribed deadline did not work in its favour. This is a reasonable conclusion. Pay Audio had ample opportunities to correct the error but failed to act with due dispatch. "Equity aids the vigilant, not those who sleep on their rights" and the lack of attention and undue delay by Pay Audio in rectifying the error undermines its arguments for equitable relief.

[37] As reflected in the Decision, the Minister's Delegate carefully reviewed and considered Pay Audio's remission request on its own merits, taking into account all the facts and arguments raised by KPMG, to determine whether the collection of tax was unreasonable or unjust, or whether it was otherwise in the public interest to grant relief under subsection 23(2) of the FAA.

[38] It is a well-recognized principle that a decision-maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown (see *Florea v Canada*

*(Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) (QL) at para 1). In the present case, the reasons are more than sufficient to allow this Court to understand why the Minister's Delegate made the Decision and permit it to determine whether the conclusion is within the range of acceptable outcomes.

[39] Pay Audio has failed to establish that any relevant facts or circumstances were overlooked, disregarded or not properly considered by the Minister's Delegate.

[40] In light of my conclusion that the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law, I need not decide whether this Court has jurisdiction to grant the relief requested by Pay Audio to refer the matter back to the Minister for determination with directions that the amount of \$203,093.33 be remitted to Pay Audio. However, I would simply observe that if the Court determines on judicial review that a discretion was not properly exercised, the matter is generally referred back for reconsideration. It is not the Court's function to direct how a decision-maker should exercise its discretion. In any event, under subsection 23(2) of the FAA, the discretion whether to remit any taxes or penalties vests in the Governor in Council, and not the Minister, whose only role is to make a recommendation.

## VI. Conclusion

[41] It is common ground that remission of taxes is an extraordinary remedy that is granted in exceptional circumstances. The Decision declining to grant such relief falls within a range of possible, acceptable outcomes defensible in respect of the facts and law. Moreover, the Decision

is consistent with the purposes of the legislation and the guidelines and equitable doctrine. For the above reasons, the application is dismissed, with costs.

[42] The parties agreed at the conclusion of the hearing that costs should be awarded to the successful party and fixed in the amount of \$3,000.00, inclusive of disbursements and taxes.

**JUDGMENT IN T-450-17**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. Costs of the application, hereby fixed in the amount of \$3,000.00, inclusive of disbursements and taxes, shall be paid by the Applicant to the Respondent.

"Roger R. Lafrenière"

---

Judge



**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-450-17

**STYLE OF CAUSE:** SOCIÉTÉ EN COMMANDITE SERVICES  
AUDIONUMÉRIQUES/PAY AUDIO SERVICES  
LIMITED PARTNERSHIP v MINISTER OF NATIONAL  
REVENUE

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** APRIL 24, 2018

**JUDGMENT AND REASONS:** LAFRENIÈRE J.

**DATED:** MAY 8, 2018

**APPEARANCES:**

M<sup>c</sup> Guy Du Pont FOR THE APPLICANT  
M<sup>c</sup> Anne-Sophie Villeneuve

M<sup>c</sup> Ian Demers FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Davis Ward Phillips & Vineberg, FOR THE APPLICANT  
LLP  
Barristers and Solicitors  
Montréal, (Québec)

Attorney General of Canada FOR THE RESPONDENT  
Montréal, (Québec)