Federal Court Cour fédérale

Date: 20190115

Docket: T-235-18

Citation: 2019 FC 51

Ottawa, Ontario, January 15, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

4053893 CANADA INC.

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Canada Revenue Agency [CRA] is granted legislative authority to provide relief to taxpayers who voluntarily come forward to disclose information not previously reported to the CRA. This authority is operationalized through the CRA's Voluntary Disclosures Program [VDP]. Under the VDP, a non-compliant taxpayer may be granted relief from penalties and

prosecution where the non-compliance is disclosed by the taxpayer and it is determined that the conditions set out in the VDP have been met.

[2] The applicant, 4053893 Canada Inc. [405], requested relief under the VDP, a request that was initially denied. A second administrative review or reconsideration of the negative decision was sought; the Minister's Delegate [Delegate] maintained the denial, and 405 now seeks judicial review of that decision. The applicant submits the Delegate erroneously found that (1) enforcement action had been taken against 405 before it filed its voluntary disclosure and (2) enforcement action against 405's sole owner and director, in his personal capacity, disqualified the disclosure.

[3] The application is granted. For reasons set out in greater detail below, the basis for the Delegate's conclusion that the disclosure was not "voluntary" is not evident from the decision or the underlying record. This lack of transparency renders the decision unreasonable.

II. Background

[4] 405 is a corporation that is wholly owned by Mr. Brent Harris, who is also 405's sole director. Mr. Harris had not filed his personal income tax returns for the 2006 to 2015 taxation years. By letter dated August 18, 2016, the CRA wrote to Mr. Harris notifying him of his obligation to file his personal income tax returns, and Mr. Harris subsequently discussed the letter with the CRA over the phone.

[5] In January 2017, 405's representative filed a no-names voluntary disclosure letter with the CRA. 405 had not filed its tax returns since 2003.

[6] By letter dated February 6, 2017, the CRA acknowledged receipt of the written VDP request, established that the effective date of disclosure was January 17, 2017, and advised that "[c]onfirmation of whether this disclosure is voluntary and/or complete will not be made until the identity of the taxpayer is known and other conditions for a valid disclosure (as noted above) have been met."

[7] By letter dated May 8, 2017, 405's representative advised the CRA that the unnamed taxpayer was 405. 405's voluntary disclosure was completed in June 2017 with the submission of completed forms and returns for the years of 2006 to 2016.

[8] In a letter dated September 18, 2017, a delegate of the Minister, in a "first-level" review, denied the request under the VDP, finding the disclosure was not voluntary as "[the CRA] started contacting you before the disclosure date for the same matter or information being disclosed."

[9] In October 2017, 405's representative requested a second administrative review, noting the absence of any detail in the September 18, 2017 letter of the "purported prior contact" and stating that there had been no contact between the CRA and 405 prior to the submission of the effective date of disclosure.

III. The Decision under Review

[10] The January 10, 2018 decision letter stated that 405's circumstances had been carefully considered and that pursuant to Information Circular IC00-1R5, the disclosure was found not to be "voluntary." The Delegate noted that a telephone conversation had taken place between a CRA officer and Mr. Harris on August 19, 2016, in which (1) Mr. Harris confirmed that 405 was still active; (2) Mr. Harris was informed that he had to file both his personal and business tax returns but that the business returns had to be filed first; and (3) Mr. Harris said he had to find a representative to help with his filing obligations.

[11] The Delegate concluded that since this conversation had taken place before the disclosure, 405 had not satisfied the requirements of the Voluntary Disclosure Program.

IV. Relevant Law

[12] Subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), provides that the Minister may waive or cancel all or any portion of any penalty or interest owed by a taxpayer. Similar authority is granted by Parliament in other taxation statutes, and, as noted above, this authority is operationalized through a CRA Information Circular [IC]. The IC governing the Delegate's consideration of 405's voluntary disclosure request was IC00-1R5 – Voluntary Disclosures Program. A new version of the IC has since replaced IC00-1R5.

[13] IC00-1R5 identifies four conditions that must be met for a valid disclosure: the disclosure must be voluntary, be complete, involve a penalty, and include information that is at least one

year past due. Disclosure will not be voluntary where the taxpayer has knowledge of any enforcement action to be conducted by the CRA in respect of the disclosure or where enforcement action has been initiated against another taxpayer or a person associated with the disclosing taxpayer and that action is likely to have uncovered the information being disclosed. Paragraph 32 of the IC describes the "voluntary" requirement as follows:

Conditions of a valid disclosure	**Conditions d'une divulgation valide**
i) Voluntary	**i) Volontaire**
32. A disclosure will not qualify as a valid disclosure, subject to the exceptions in paragraph 34, under the "voluntary" condition if the CRA determines:	32. Une divulgation ne sera pas considérée comme une divulgation valide, sous réserve des exceptions du paragraphe 34, en vertu de la condition « volontaire » si l'ARC détermine ce qui suit :
• the taxpayer was aware of, or had knowledge of an audit, investigation or other enforcement action set to be conducted by the CRA or any other authority or administration, with respect to the information being disclosed to the CRA, **or**	• le contribuable était au courant d'une vérification, d'une enquête ou d'autres mesures d'exécution que devait entreprendre l'ARC ou toute autre autorité ou administration, en ce qui concerne les renseignements divulgués à l'ARC; **ou**
• enforcement action relating to the disclosure was initiated by the CRA or any other authority or administration on the taxpayer, or on a person associated with, or related to the taxpayer (this includes, but is not restricted to, corporation, shareholders, spouses and	• les mesures d'exécution relatives à la divulgation ont été prises par l'ARC ou toute autre autorité ou administration, à l'égard du contribuable ou d'une personne associée ou apparentée avec le contribuable (y compris, sans toutefois

partners), or on a third party, where the purpose and impact of the enforcement action against the third party is sufficiently related to the present disclosure, **and**	s'y limiter, des sociétés, des actionnaires, des conjoints et des associés) ou contre n'importe quel autre tiers où le but et l'impact de l'action applicable contre le tiers est suffisamment lié à la divulgation actuelle; **et**
• the enforcement action is likely to have uncovered the information being disclosed.	• les mesures d'exécution sont susceptibles d'avoir révélé renseignements divulgués.

V. Issues and Standard of Review

[14] I need only consider one issue: was the Delegate's denial of the voluntary disclosure unreasonable?

[15] The jurisprudence establishes, and the parties agree, that discretionary decisions relating to the VDP are to be reviewed against a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51 [*Dunsmuir*]; *Worsfold v Canada (Minister of National Revenue)*, 2012 FC 644 at paras 104–105). Reasonableness is a deferential standard. A reviewing court is to be concerned with whether (1) the decision-making process reflects the elements of justification, transparency, and intelligibility; and (2) the decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law (*Dunsmuir* at para 47).

VI. Analysis

A. *Was the denial of the voluntary disclosure unreasonable?*

[16] The applicant has made lengthy submissions addressing the "voluntary" requirement as defined at paragraph 32 of the IC. It is evident upon review of the "memo to file" recommending denial, which the Delegate relied on, that the decision is based upon the second of the two conditions set out in paragraph 32 of the IC—enforcement action against someone related to the applicant had been initiated and that action was likely to have uncovered the information being disclosed. I need to consider whether the refusal, on this basis, was reasonable.

[17] The respondent submits that the Delegate's decision was reasonable. It notes that the Delegate explicitly relied on (a) numerous prior CRA enforcement actions against Mr. Harris; (b) the letter to Mr. Harris in August 2016 advising him of enforcement action against him in is personal capacity; (c) the phone call with Mr. Harris where he advised that the applicant was still active and that he was a self-employed consultant; and (d) the phone call from the applicant's representative requesting more time to file the returns. The respondent submits that the enforcement action against Mr. Harris in his personal capacity would have uncovered the non-compliance of the applicant as Mr. Harris was the sole owner, director, and employee of the applicant. I am not convinced.

[18] This Court has consistently held that it is insufficient to simply conclude on the basis of an existing relationship that enforcement action against one taxpayer would uncover information contained in a second taxpayer's voluntary disclosure (*Worsfold* at paras 123, 127–128, citing

Poon v R, 2009 FC 432 at paras 21–26; also see *Matthew Boadi Professional Corporation v Canada (Attorney General)*, 2018 FC 53 at paras 27, 32).

[19] The failure to address how enforcement action against one taxpayer would "likely" uncover information that is the subject of voluntary disclosure by another taxpayer undermines the elements of justification, transparency, and intelligibility. This in turn prevents a reviewing court from determining whether the decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

[20] In this case, the decision letter references a telephone conversation between Mr. Harris and the CRA, relying on notes created by the CRA officer who spoke with Mr. Harris. The applicant argues, relying on *Chou v Canada (Minister of Citizenship and Immigration)* (2000), 190 FTR 78, aff'd 2001 FCA 299, that the CRA officer's notes cannot be relied upon to establish the substance or content of the telephone call. The respondent submits that the notes are part of the record and were properly considered by the Delegate.

[21] There is no doubt that the notes form part of the record in this case and were available to the Delegate to consider. In *Chou*, the Court was asked to consider the substance of a visa officer's notes regarding what took place at an interview. In this case, the respondent submits that the notes, regardless of content, were properly before the Delegate and the Delegate did not err by relying upon them. I agree. This situation can be distinguished from *Chou*: in that case, the Court itself was being asked to consider the content of an officer's notes, whereas in this case, I am reviewing the Delegate's decision based on the record before her, which included notes by a

CRA officer. There may well be a fairness issue arising from the Delegate's reliance on the notes without first disclosing them to the applicant, but that issue has not been raised and I express no opinion on it.

[22] Nonetheless, I am of the view that the Delegate erred. The decision is best described as sparse in support of the conclusion that enforcement action against Mr. Harris personally was likely to have uncovered the information that was the subject of the applicant's voluntary disclosure. A mere description of the contents of the phone call between Mr. Harris and the CRA officer, even assuming the notes are accurate, does not address the concern raised. Neither the decision letter nor the "memo to file" engages in any analysis as to how the enforcement action against Mr. Harris would likely have uncovered the information disclosed by the applicant. The respondent's submissions to the effect that the Delegate could reasonably conclude, based on Mr. Harris's role as the sole owner, director, and employee of the applicant alone, that the applicant's information would have been uncovered in the course of the enforcement action against Mr. Harris is inadequate. Simply looking at the relationship between the parties is insufficient (*Worsfold* at para 123).

VII. Conclusion

[23] The application is granted.

[24] On the issue of costs, the parties have agreed that in the event of the applicant's success, an award in the amount of $6,171.63 would be warranted. I am satisfied that the agreed-upon

amount is reasonable. The applicant shall have its costs in the amount of $6,171.63 inclusive of taxes and disbursements.

JUDGMENT IN T-235-18

THIS COURT'S JUDGMENT is that:

1. The application is granted;
2. The matter is returned for redetermination by a different decision maker; and
3. Costs are awarded to the applicant in the amount of $6,171.63 inclusive of taxes and disbursement.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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