Date: 20061027

Docket: T-2223-05

Citation: 2006 FC 1296

Ottawa, Ontario, October 27, 2006

PRESENT: The Honourable Barry Strayer

BETWEEN:

MCNAUGHT PONTIAC BUICK CADILLAC LTD.

Applicant(s)

and

CANADA CUSTOMS AND REVENUE AGENCY

Respondent(s)

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review of a decision of the Canada Customs and Revenue Agency (CCRA) of November 28, 2005 refusing the Applicant's request for the waiver of a penalty of $10,538.60 imposed by a Notice of Assessment dated September 28, 2005. The power to waive penalties is given to the Minister of National Revenue (Minister) by subsection 220(3.1) of the *Income Tax Act* (Act), R.S.C. 1985, c. 1 (5th Supp.) which provides as follows:

(3.1) The Minister may at any time waive or cancel all or any portion of any penalty or interest otherwise payable	(3.1) Le ministre peut, à tout moment, renoncer à tout ou partie de quelque pénalité ou intérêt payable par ailleurs par

under this Act by a taxpayer or partnership and, notwithstanding subsections 152(4) to 152(5), such assessment of the interest and penalties payable by the taxpayer or partnership shall be made as is necessary to take into account the cancellation of the penalty or interest.	un contribuable ou une société de personnes en application de la présente loi, 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.

[2] The decision in question here was taken on behalf of the Minister by Bruce Cook, Director of the Winnipeg Tax Services Office of the CCRA.

Facts

[3] The main facts are not in dispute. The Applicant is a Winnipeg business which is considered for income tax purposes to be a large employer as defined by the Income Tax Act and Regulations. As such it is required to remit tax deductions from employees' salaries to CCRA through a financial institution, such remittance being accompanied by a remittance form. On September 20, 2005 such a remittance was due in the amount of $105,386.05. Albert Sankow, an employee of the Applicant, had as one of his duties the delivery of documents, cheques, etc. On that day, he was given by the Accounting Department a cheque in the full amount together with a remittance document. He went to the Applicant's bank, a branch of the Royal Bank of Canada, and when he arrived he discovered that he had misplaced the remittance form. A bank teller told him that without the remittance form the bank could not accept the payment. As he knew of the importance of payment being made that day, he went to the Winnipeg Tax Services Office of CCRA. He spoke to a cashier, explained to her that he did not have the remittance form but he had

the cheque, and was advised by the cashier that payment could be made there. A cheque was accepted by the Tax Services Office and Mr. Sankow was given a cheque remittance stub stamped September 20, 2005. Judy Karlson, the Payroll Administrator of the Applicant subsequently learned that the remittance had been delivered to the Tax Services Office and not the bank. She had worked for the Applicant less than a year and while she understood that the normal practice was to make remittances at the bank she did not know that the Applicant was required by law to make its remittances there.

[4] On September 28, 2005, CCRA sent a Notice of Assessment of a penalty of $10,538.60 because the remittance of $105,386.05 had been made directly to CCRA rather than to a financial institution. (Under paragraph 227(9)(a) of the Act a person who has failed to remit a sum as required by the Act or Regulations is subject to a penalty of ten percent of that amount.) On September 30, 2005, the Applicant made a request to have the penalty waived, giving the explanation that "in error the gentleman who acts as our in-house courier mistakenly took the remittance to your location on Broadway instead of the Royal Bank". The first decision on this fairness request was given in a letter of October 21, 2005 by K. Guse, Manager of Revenue Collections, at the Tax Services Office. The relevant part of that letter reads as follows:

> We are unable to approve your request for relief under the criteria of 'extraordinary circumstances', because we can find no evidence of circumstances beyond your control that would have prevented you from complying with the requirements of the Income Tax Act.
>
> Examples of 'extraordinary circumstances' include, but are not limited to, exceptional situations such as a natural disaster or a postal strike, all of which have grave impact on our day-to-day activities. Unfortunately, human error is not considered to be an 'extraordinary circumstance' as per our policies. As you are a Threshold 2, Accelerated remitter, you are required to make your remittances at a Canadian financial institution.

[5] On October 26, 2005, the Applicant wrote another letter requesting a reconsideration of this decision. The letter set out in more detail what had happened on September 20, 2005. Unlike the first request which simply referred to the error of their courier in going to the wrong place, the new letter explained that the process had started out correctly with the courier taking the cheque and remittance form and going to the Royal Bank, but somehow misplacing the remittance form. The point was made that the cheque was accepted at the Tax Services Office by the cashier and a receipt issued and no suggestion was made by the cashier that a remittance to that office was improper. The Applicant's letter confirmed that neither the courier nor the Payroll Administrator of the Applicant had been aware that remittance to a financial institution was the only method permitted. A letter of November 28, 2005 dismissing this second review of the fairness request was sent by Bruce Cook who had conducted the second review. The relevant paragraphs are as follows:

> On second review, I am unable to approve your request for relief under the criterion of 'extraordinary circumstances', because I could not find evidence that the Agency's discretion was not exercised in a reasonable manner during the first review, or that any further information has been submitted to demonstrate there were circumstances beyond your control that prevented you from complying with your statutory requirements under the Income Tax Act.
>
> As outlined in our letter of October 21, 2005, it is the employer's responsibility to ensure that payroll remittances are received on a timely basis. As per our policies, the anticipation of the events you have described, and the implementation of alternate remitting procedures is a part of that responsibility. Moreover, our records indicate that you were made aware of the requirement to bank-remit payroll deductions at least on two previous occasions.

[6] These are the essential elements of the case. There are a few internal documents which Mr. Cook would have had before him, some of which will be mentioned in passing. The Respondent however has supplemented his record by filing an affidavit of Bruce Cook whose decision is under review. Some of this may be admissible as evidence of the procedure and the documents which he had before him in making the decision, but I have serious reservations about him testifying now as to the factors he took into account in exercising his discretion. When a tribunal decision is under judicial review, the record should consist of the material which was before the tribunal together with its recorded decision (see e.g. *Canadian Broadcasting Corp. v. Paul*, [2001] F.C.J. No. 542 at para. 77 (C.A.)), not an *ex post facto* explanation of why the decision was made. There may be rare occasions where there are factual issues concerning the manner of conduct of the decisional process, where some such affidavit as to procedure may be justified (see e.g. *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, [2002] F.C.J. No. 813, para. 30 (C.A.)) or where an issue of jurisdiction is involved (see *McFadyen v. Canada (Attorney General)*, [2005] F.C.J. No. 1817 at para. 15 (C.A.)) but no such issues are involved here. The Applicant did not object to this affidavit and I did not reject it but I may be somewhat selective in resorting to it: for example, the deponent makes the statement that he "took into consideration the criteria outlined in Information Circular 92-2…". That is not apparent from his written decision of November 28, 2005 which appears to focus on one or two criteria only.

Analysis

[7] The parties agree that the standard of review in judicial review of the exercise of the Minister's discretion under subsection 220(3.1) is that of reasonableness. The Federal Court of Appeal has so held in respect of the exercise of ministerial discretion under another fairness section

of the Act: see *Lanno v. Canada (Customs and Revenue Agency)* [2005] F.C.J. No. 714. I respectfully accept that their pragmatic and functional analysis would be equally applicable to this fairness section and will proceed on that basis.

[8] I believe that the decision maker in this case, the Director of the Winnipeg Tax Services Office (Director), who signed the final letter of November 28, 2005 failed to take into account factors and in purporting to apply the "Guidelines for the Cancellation and Waiver of Interest and Penalties" (Information Circular 92-2 hereafter referred to as "the guidelines") applied them somewhat selectively and in my view misconstrued them.

[9] To begin with there seems to be a certain assumption that the guidelines are binding and exhaustive. It will be noted in both departmental decisions of October 21 and November 28, 2005 that there is considerable emphasis on the non-existence of "extraordinary circumstances". That is an expression found once in the guidelines under the heading "Guidelines and examples of circumstances where cancelling or waiving interest or penalties may be warranted". The guidelines also contain paragraph 3:

> These are only guidelines. They are not intended to be exhaustive, and are not meant to restrict the spirit or intent of the legislation. As the Department gains experience in applying the legislation, these guidelines may be adjusted, as necessary.

[10] Indeed if the guidelines did purport to be binding or exhaustive, they could be successfully attacked as fettering the Minister's discretion: see, for example, *Yhap v. Canada (Minister of Employment and Immigration)* [1990] 1 F.C. 722. The Director and those advising him seem to have rejected the Applicant's request mainly because the facts did not in their view amount to

"extraordinary circumstances". In doing so, they ignored one of the examples of extraordinary circumstances namely paragraph 6(d) "errors in processing". In my view, they should have considered whether the willingness of the cashier at the Tax Services Office to accept a cheque for $105,386.05 was not an "error in processing". I find unconvincing the Respondent's arguments that a cashier could not quickly ascertain whether this taxpayer was entitled to remit to the Tax Services Office, or could not reject an improper payment without disclosing the details of the taxpayer's affairs.

[11] Section 10 of the guidelines also lists several factors which will be considered when determining whether or not to waive penalties. One of these is:

> (c) whether or not the taxpayer or employer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system;

[12] In the internal memoranda and in the recorded decisions, I see little evidence of consideration as to whether the Applicant has used reasonable care in the conduct of its affairs. CCRA seems to treat the responsibility of the taxpayer as one of strict liability. The Applicant admits that it had not explained to the courier or the Payroll Administrator that such remittances could only be made at a financial institution. On the other hand, there is evidence which is not contradicted that the Applicant had set up a system whereby the courier would take the remittance cheques and the remittance forms to the Royal Bank in a timely fashion. A problem arose here not because the courier was sent without a cheque or remittance form but because somehow he misplaced that form before he reached the Royal Bank. The Director in my view should have considered whether, in the circumstances, what happened was reasonably foreseeable by the

employer or whether it was an unforeseen accident. The decision makers obviously gave some weight to the fact that this taxpayer had been warned twice before about making remittances to the wrong place, thereby deducing that the Applicant here was careless in allowing the same thing to happen again. However, it should also have been noted that these two warnings had been issued back in 1999, some six years before the incident in question. In considering the guideline factor of whether or not the taxpayer or employer "has a history of compliance with tax obligations", mention was made in the material of this taxpayer having been late in paying taxes in 1997 and in 2001 although no written evidence is provided of these incidents. There is nothing to indicate the circumstances or the amounts involved. Mention is also made that the penalty levied by the Notice of Assessment of September 28, 2005 had not yet been paid as of the time of the negative decision on the fairness request dated exactly two months later. Some consideration might have been given as to the reasonability of a taxpayer delaying payment of a penalty while a request for relief was still pending.

[13] I am therefore of the view that the decision made by the Director on behalf of the Minister should be set aside because he did not have regard to some relevant factors.

Disposition

[14] The decision will be set aside and the matter referred back to the Minister for reconsideration in accordance with these reasons, having regard to whether his discretion should be exercised so as to waive the penalty in whole or in part.

JUDGMENT

THIS COURT ADJUDGES that:

1. the decision of the Minister represented by the letter of November 28, 2005 be set aside;
2. the matter be referred back to the Minister or his representative for redetermination in accordance with these reasons as to whether the penalty should be waived in whole or in part; and
3. costs be awarded to the Applicant.

" B. L. Strayer "
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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