Date: 20070531

Docket: T-597-06

Citation: 2007 FC 560

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 31, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

LES PEINTRES FILMAR INC.

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

OVERVIEW

[1] Truth is unequivocal! If it is not complete, it cannot be qualified as the truth. No one has all the truth, but what a person has must be shared to be qualified as his or her truth. Otherwise, what person or, similarly, what government body could have confidence in its content?

[2] In sharing or correcting explanations regarding their truth, or what they know, a person or a corporate entity is not blamed for what they admit, but rather for what is not said. Simply put, in the case of voluntary disclosure, it is not what is said that makes them liable, but rather their actions, related to the evidence, that themselves expose them to what they knew and did not fully disclose, as applicable. Before this Court, at this stage, it is only the reasonableness of the decision itself, refusing to follow up on the voluntary disclosure, that is considered, not the final result, weighing what was said in that voluntary disclosure.

[3] The Minister of National Revenue is authorized to cancel or waive penalties under subsection 220(3.1) of the *Income Tax Act*, R.S.C. 1985, c.1, (5th Supp.) (ITA), and paragraph 900(4)(b) of the *Income Tax Regulations*, C.R.C., c. 945, with regard to the criteria set out in Circular IC00-IR (Circular) and the Canada Revenue Agency's Guidelines.

[4] The Voluntary Disclosure Program (VDP) is a fairness initiative that allows taxpayers to correct inaccurate or incomplete information or provide information that was not reported, without incurring a penalty or legal action.

[5] The purpose of the program is to promote voluntary compliance and payment of duties and taxes set out in the ITA, among other things. The VDP encourages taxpayers to take the initiative to correct any problems in order to comply with their legal obligations.

INTRODUCTION

[6] The desired purpose of the application for judicial review filed by the applicant on April 3, 2006 is to [TRANSLATION] "declare invalid and unlawful" the "decision made on March 2, 2006 [...] by Mr. Guy Gohier, Chief of Appeals at the Montréal Tax Services Office [...]", by which he refused to follow up on the voluntary disclosure proposed by the applicant, on that grounds that it was incomplete. (C. I and II, Application for Judicial Review, April 3, 2006; Exhibit N, Affidavit by Eugene Cirillo, May 3, 2006.)

[7] The sole issue is therefore whether, in doing so, the Chief of Appeals reasonably exercised the discretion afforded him by subsection 200(3.1) of the ITA and paragraph 900(4)(b) of the *Income Tax Regulations* with regard to the criteria set out in Circular ICOO-IR and the Guidelines. (Exhibits O and P, Affidavit by Eugene Cirillo; *Litmar Ltd. v. Canada (Customs and Revenue Agency)*, 2006 FC 635, [2006] F.C.J. No. 814 (QL).)

[8] Under the powers granted it by section 18.1 of the *Federal Courts Act*, R.S.1985, c. F-7, this Court does not have jurisdiction to judicially review any other decision that the Minister's employees may have made as part of their duties, including but not limited to, that of [TRANSLATION] "proceeding to the Special Investigations Division" or that of "pursuing a criminal investigation". (C. III, Application for Judicial Review, April 3, 2006.)

JUDICIAL PROCEEDING

[9] This is a motion asking the Court to issue an interim order under section 18.2 of the *Federal Courts Act* aimed at preventing the respondent from assessing penalties under subsection 163(2) of the ITA, from pursuing its criminal investigation or from filing charges until a final decision is made in this case.

[10] It is also a motion asking the Court to issue an order to have all documents in the respondent's possession transmitted to it that were not transmitted in response to the request submitted by the applicant under Rule 317 of the *Federal Courts Rules*, SOR/98-106. As such, the applicant is seeking an extension of the time set out in Rule 309 of the *Federal Courts Rules* for serving the applicant's record by 30 days from the date on which the applicant receives the transmitted documents.

[11] The applicant is also asking that the Court award it costs related to this motion.

FACTS

[12] On February 18, 2003, the applicant, Peintres Filmar Inc., contacted the Appeals Division at the Montréal Tax Services Office of the Canada Revenue Agency to make anonymous use the VDP.

[13] On about March 18, 2003, the Small and Medium Enterprise Audit Division of the Tax Services Office contacted the applicant to advise it of their intention to conduct an audit. The

applicant advised them that a voluntary disclosure was already underway. The applicant decided to proceed with an audit despite the ongoing voluntary disclosure.

[14] On April 14, 2003, as part of the VDP, the applicant sent a summary of invoices totalling $163,953.46 covering the calendar years from 1999 to 2001. On January 26, 2004, as part of the VDP, the applicant sent a copy of the invoices listed in the summary. It was not advised in advance that the respondent refused the voluntary disclosure on the grounds that the applicant had already made use of the VDP.

[15] On March 22, 2004, the Small and Medium Enterprise Audit Division transferred the applicant's file, without its knowledge, to the Special Investigations Division on the grounds that the voluntary disclosure was incomplete because an amount of $35,865 (including taxes) was omitted from the disclosure.

[16] During a meeting held on March 25, 2004, the officer responsible for the applicant's file advised it that he could not retain its file as a voluntary disclosure because it was incomplete.

[17] The applicant alleges that it never had an opportunity to explain the alleged discrepancies. Instead, following a meeting held before March 22, 2004, between the Small and Medium Enterprises Audit Division and the Appeals Division of the respondent, the decision was made to transfer the file to the Special Investigations Division following the audit.

[18] On July 5, 2004, the applicant received a letter from the respondent advising, on the one hand, that its file was refused under the VDP and, on the other hand, that it could request a second review by the Director of the Tax Services Office.

[19] On September 20, 2005, the respondent executed five search warrants based on the information obtained.

[20] On November 28, 2005, the applicant asked the Director of the Tax Services Office to conduct a second impartial review of its file. On March 2, 2006, the Chief of Appeals issued a decision by which he refused to accept the request by the applicant as part of the VDP to cancel or waive penalties. The applicant received that letter on March 8, 2006.

[21] On April 3, 2006, the applicant filed an application for judicial review of the decision issued on March 2, 2006. First, the application seeks to have the decision to refer the applicant's file invalid and unlawful. Second, the application seeks a declaration that the respondent acted without jurisdiction or exceed its jurisdiction by refusing the applicant's request under the VDP. Finally, the application seeks an order under subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I, Schedule B of the *Canada Act 1982*, c. 11 (UK) (Charter), declaring that the decision violates the applicants Charter rights.

On July 7, 2006, the applicant filed a motion under section 18.2 of the *Federal Courts Act* that is the subject of this case.

IMPUGNED DECISION

[22] Having found that the voluntary disclosure application by the applicant, Peintres Filmar Inc., was incomplete, the Montréal Tax Services Office dismissed the request for a second impartial review of the applicant's voluntary disclosure file.

ISSUE

[23] The applicant's motion essentially seeks three things:

(1) The extension of the deadline set out in Rule 309 of the *Federal Courts Rules* regarding the service of the applicant's record;

(2) An interim order under section 18.2 of the *Federal Courts Act* to prevent the respondent from assessing penalties, pursuing its criminal investigation or filing charges until a final decision is made in this case;

(3) An order to have all documents in the respondent's possession transmitted that have not been transmitted, namely:

- a copy of computer screen captures from the audit file identifying the grounds for selection for audit;
- other documents that the respondent objects to transmitting, i.e. a full copy of the special investigations file and a full copy of the numerous exchanges between the Appeals Division, the Audit Division and the Director's office as part of the applicant's impartial second review.

VDP

[24] The Minister of National Revenue is authorized to cancel or waive penalties under subsection 220(3.1) of the ITA and paragraph 900(4)(b) of the *Income Tax Regulations*, with regard to the criteria set out in the Circular and the Canada Revenue Agency's Guidelines.

[25] The VDP is a fairness initiative that allows taxpayers to correct inaccurate or incomplete information or provide information that was not reported, without incurring a penalty or legal action.

[26] The purpose of the program is to promote voluntary compliance and payment of duties and taxes set out in the ITA, among others. The VDP encourages taxpayers to take the initiative to correct any problems in order to comply with their legal obligations.

[27] The Revenue Agency allows taxpayers to avoid penalties when the conditions set out in the Circular are met. For a voluntary disclosure to be valid, it must meet four conditions: be voluntary, be complete, include a penalty, and contain information that is at least one year late being filed.

[28] Under paragraph 6(b) of the Circular, although the information provided in a disclosure must be essentially complete, a disclosure will not be disqualified simply because it contains errors or minor omissions. Under paragraph 8.4 of the Guidelines, determination of whether or not a disclosure is complete must take into account the efforts by the taxpayer to provide the most accurate and complete information. If the disclosure is essentially complete, it will be deemed

complete. According to the DPV Guidelines, to determine whether an omission is material for a given year, the respondent must consider all omissions and the original amount disclosed by the applicant.

[29] The Guidelines also state the following regarding the determination of the completeness or incompleteness of a voluntary disclosure:

> [TRANSLATION]
>
> - In many cases, the VDP officer will be able to determine whether or not the disclosure is complete. However, when in doubt in this regard, the disclosure should be forwarded to V&E for them to conduct a subsequent validation and recommend a position on whether or not to accept the disclosure as complete. In some situations, the VDP officer and the auditor may find it useful to discuss a case. In all cases, V&E must advise the VDP officer of the results and provide the audit report. Although the recommendation by V&E must be taken into consideration, the final decision on whether a disclosure is complete is up to Appeals.

[30] Under paragraph 10.3 of the VDP Guidelines, if a taxpayer disagrees with a decision and believes that the respondent did not fairly and reasonably exercise its discretion, the taxpayer may contact the Director of the appropriate Tax Services Office in writing to request a second impartial review.

LEGISLATIVE FRAMEWORK

[31] Section 18.2 of the *Federal Courts Act* reads as follows:

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.	**18.2** La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

[32] The three conditions for granting an interim order under section 18.2 of the *Federal Courts Act* are as follows: i) the existence of a serious question to be tried; ii) irreparable harm to the applicant if the interim order is not issued; and iii) the balance of convenience. (*R.J.R. - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 (QL).)

[33] Moreover, an interim order staying proceedings if, without it, an application for judicial review would be ineffective or moot. (*Capital Vision Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2000] F.C.J. No. 954 (QL).)

Granting of an interim order

i) Serious question to be tried

[34] The applicant bears the burden of establishing the existence of a serious question to be tried. According to the courts, for a proceeding to raise a serious question to be tried, it must not be frivolous or vexatious. These minimal requirements are not high. (*R.J.R. - MacDonald*, above.)

[35] The applicant alleges that there is a serious question to be tried, namely whether:

a) The respondent acted without jurisdiction or exceeded its jurisdiction in refusing to consider the applicant's voluntary disclosure to be complete;

b) The respondent's decision violated the applicant's Charter rights;

c) The respondent did not exercise the rules of natural justice or procedural fairness;

d) The respondent's decision is clearly unreasonable under the circumstances.

ii) Irreparable harm

[36] The applicant claims that it would suffer irreparable harm if the interim order is not granted, as the application for judicial review before this Court would become moot and ineffective. Before this Court could have the opportunity to rule on the merits of the application, the applicant could be assessed the civil penalties and criminal fines set out in subsection 163(2) and section 239 of the ITA. If charges were laid against the applicant, without being convicted, it could also lose the right to the protection of confidential information and the privacy promised under the VDP (*Capital Vision*, above.)

iii) Balance of convenience

[37] The applicant alleges that the balance of convenience favours granting the interim order, as the respondent would not suffer any harm if the order is granted. On the one hand, there is no timeline within which the Minister of National Revenue must assess when a penalty applies under subsection 163(2) of the ITA. On the other hand, the Court has ample time to rule on the application

before the filing of charges is statute-barred. Consequently, only the applicant would suffer harm if the order is not granted.

Documents (according to the applicant)

[38] The applicant alleges that the documents in the respondent's possession that were not sent to it in response to its request under Rule 317 of the *Federal Courts Rules* are necessary for the preparation of the applicant's record.

[39] The applicant also argues that the other documents requested in the notice of application, which the respondent objects to transmitting on the grounds that the requested documents and information are protected under the privilege of the ongoing investigation, are not subject to any privilege that would prevent the applicant from obtaining them as part of its application before the Court.

[40] As such, the applicant claims that a portion of the documents transmitted confirms that there were numerous exchanges between the Appeals Division, the Audit Division and the Director's office as part of the applicant's second impartial review and, thus, that the respondent cannot allege privilege when some of the parties involved are not investigative bodies.

Extension of the deadline (according to the applicant)

[41] The applicant alleges that an extension of the deadline for filing its record with this Court is needed if other documents are to be provided to it by the respondent.

Extension of the deadline (according to the respondent)

[42] The respondent does not object to this request.

Documents (according to the respondent)

[43] The respondent alleges that all copies of screen captures in the audit file that identify the reasons for selection for audit were sent to the applicant, except one copy that is included in Appendix A of the respondent's arguments.

[44] Regarding other documents (see statements below)

CONCLUSION

Granting of an interim order

i) Serious question to be tried

[45] The Court agrees with the two parties that there is a serious question to be tried.

ii) Irreparable harm

[46] The applicant would not suffer irreparable harm in this case by being the subject of a criminal investigation, particularly as that investigation is clearly related to facts that have no relevance is determining whether the Chief of Appeals reasonably exercised his discretion under the ITA. Moreover, the applicant retains the right to exercise all its rights under the *Criminal Code*, R.S.C. 1985, v. C-46, if criminal charges are eventually laid against it, including arguing that the

evidence gathered during the investigation was gathered in a manner inconsistent with the Charter guarantees, if such were the case.

[47] Further, the applicant suffers no irreparable harm from the fact that it could be assessed the penalties set out in the ITA on amounts that it failed to disclose or on elements that the investigation could eventually reveal, particularly as it retains the right to exercise its rights under the relevant provisions of the ITA regarding assessments that may be raised against it under the regular application of the ITA.

iii) Balance of convenience

[48] The balance of convenience favours the respondent if an order is issued by the Court requiring that it transmit to the applicant the "full copy of the special investigations file" and the "full copy of the file of Carole [Gouin], including any communications with her or an assistant regarding it and the Special Investigations Division". A litigant who is the subject of a criminal investigation does not have the right as such to be actively involved in the search for evidence to determine if a criminal offence was committed. The applicant therefore has no right, apart from the process set out in the *Criminal Code*, to obtain advance disclosure of evidence gathered at a given time, much less to obtain such an order from the Court before the investigation is even completed or charges are laid. (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83 (QL); *Canada (Attorney General) v. O'Neill*, [2005] O.J. No. 2130.)

[49] The same would be true for interrupting the respondent's criminal investigation or the laying of charges until a final decision is rendered in this case, as that would prevent the Minister from

exercising his rights and duties under the ITA when there is no link between the action taken and the reasonableness for the Chief of Appeals of basing his decision solely on the elements in the file.

[50] The Court dismisses the applicant's motion and also dismisses the "remedies" sought in the notice of motion.

JUDGMENT

THE COURT ORDERS that

1) The applicant's motion is dismissed, and the remedies sought in the notice of motion are dismissed;

2) With costs.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Josée Vigeant	FOR THE APPLICANT
Jean Lavigne	FOR THE RESPONDENT

SOLICITORS OF RECORD:

HEENAN BLAIKIE Montréal, Québec	FOR THE APPLICANT
JOHN H. SIMS, QC Attorney General of Canada	FOR THE RESPONDENT