

Date: 20090911

Docket: T-1890-08

Citation: 2009 FC 901

Ottawa, Ontario, September 11, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

HI-TECH SEALS INC.

Applicant

and

**ATTORNEY GENERAL OF CANADA
(MINISTER OF NATIONAL REVENUE)**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicant seeks judicial review of a decision by the Minister of National Revenue's delegate (Delegate) not to grant discretionary relief from the payment of penalties assessed for failure to remit withholding tax/source deductions as required by the *Income Tax Act* 1985, c. 1 (5th Supp.).

[2] The facts are not in dispute nor is the standard of review. The issues in this matter are whether the decision was reasonable and whether the Applicant received procedural fairness in respect of “adequate reasons”.

II. BACKGROUND

[3] The core event in this case was the failure to remit taxes on a non-payroll payment (payroll services were performed by another company) on March 31, 2008. The precise details of the payments were not clearly set out in the Applicant’s Record but it was clear that taxes were due April 3, 2008 and not paid until April 17, 2008. The penalty assessed for late remittance was \$79,220.25.

[4] The Minister has authority under s. 220(3.1) of the *Income Tax Act* to cancel or waive penalties and interest.

220. (3.1) The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period,

220. (3.1) Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l’année d’imposition d’un contribuable ou de l’exercice d’une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d’un montant de pénalité ou d’intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi

and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.

pour cette année d'imposition ou cet exercice, 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.

[5] There are Guidelines dealing with the exercise of the Minister's discretion and the general basis for the exercise of the discretion is one of a) extraordinary circumstances, b) actions of CRA, and c) inability to pay or financial hardship. A more complete recitation of Part II of the Taxpayer Relief Provisions/Guidelines is attached as an Annex to these Reasons.

[6] The company sought relief from the penalties on the grounds that the company's controller, who had to authorize the CRA remittance, was absent for "personal reasons". As it turns out, this is not a fulsome explanation – the controller was away on holidays, as the Applicant now admits.

[7] The Respondent denied the request for relief noting that James Bond was a principal shareholder and that he could have authorized remittance in a timely manner.

[8] As it turns out, Mr. Bond had a crucial role in an earlier tax relief request in 1997. He had been away on business and did not send the remittance until his return. In that instance, the penalty was cancelled.

[9] The company then sought a second level review but submitted no new evidence. The Delegate denied the request and in the decision-letter simply stated that the penalties were assessed in accordance with the law and that there were no circumstances beyond the company's control which prevented compliance.

[10] The Tribunal Record contains the staff's report to the Delegate as well as his comments thereon and his signature accepting the report. The report acknowledges a good compliance history, accepted that only the controller had knowledge of the payment information, noted the unexplained absence of the controller and concluded that either there should have been a back-up or the controller should have contacted the employer and could have done so given modern technology.

[11] A more detailed report, not signed by the Delegate, was found in the CRA file, which noted the details of the 1997 request for relief which had been granted.

[12] In this judicial review, the Applicant filed an affidavit in effect challenging the finding that Mr. Bond could have signed the remittance cheque. The evidence was that Mr. Bond was out of the country at the relevant time and not available to sign the remittance cheque.

III. ANALYSIS

A. *Standard of Review*

[13] The Court agrees with the parties that the standard of review on the decision itself is “reasonableness”. This has been recently reaffirmed by Justice Beaudry in *Jones Estate v. Canada (Attorney General)*, 2009 FC 646. On the question of procedural fairness/adequacy of reasons, the parties agree and the Court concurs that “correctness” is the standard.

B. *Reasonableness*

[14] The Applicant has argued that the Delegate gave insufficient importance to the controller’s absence and made a wrong assumption about Mr. Bond’s availability to make the required remittance.

[15] From the record before the Delegate, there is no question that he was mindful of the controller’s absence – CRA had been trying to find out where he was and why. Further, there was nothing before the Delegate to suggest that Mr. Bond was not available. Therefore it was a reasonable presumption that he was available, and that presumption was not rebutted. It is important to bear in mind that the burden of establishing grounds for the exercise of discretion is entirely on an applicant. The Applicant failed to advance an argument that no one was available to authorise remittances.

[16] On the basis of what was filed at CRA, the Delegate's decision was reasonable. The Applicant's attempt to supplement the record by an affidavit of new evidence in this judicial review simply confirms the reasonableness of the decision. Of equal importance is that it is improper to attempt to supplement the record of the decision without leave of the Court.

[17] Even if that new evidence were admitted, it would establish that the payments were for bonuses – the decision to pay having been made months in advance and thus remittance ought to have been anticipated. That new evidence shows that the controller was absent because of holidays not because of some unforeseen personal circumstance such as a death in the family. Lastly, that new evidence shows that Mr. Bond was out of the country when an important payment was due (as had also occurred in 1997) and that the company allowed both the controller and a principal shareholder to be absent at a critical time with no apparent back-up plan.

[18] It is difficult to see how this new evidence would have assisted the company in persuading the Delegate, but in any event it was not before the Delegate because the Applicant had not put it in evidence.

[19] The Applicant had also argued that the Delegate fettered his discretion because the 1997 penalty relief was considered a “one time” relief. The gravamen of this submission is that this present request for relief was not considered on its merits because the Delegate viewed the “one time” relief as foreclosing consideration of the current request.

[20] The difficulty with the Applicant's position is that there is no evidence that the "one time" relief formed part of the reasons for decision either at the first stage or before the Delegate.

[21] The Applicant put its compliance history in issue and it would have been appropriate to cite the similarity of circumstances in 1997 as a factor in reaching a negative decision. However, this did not occur and the Applicant can hardly now complain.

[22] Therefore, the Court concludes that either based on the record before the Delegate or if the new evidence were admissible, which it is not, the Delegate's decision was reasonable.

C. *Adequacy of Reasons*

[23] The letter decision would not have constituted adequate reasons. It is not sufficient for the Respondent to assert that the "reasons" or "reasoning" can be found by stitching together various parts of the CRA file and divining out what was in the mind of the decision maker.

[24] However, in this case, the report with notes and signature of the Delegate as well as the decision letter are readily available and adequately explain the reasons for the refusal of relief.

There is no basis for this grounds of judicial review.

IV. CONCLUSION

[25] For these reasons, the judicial review is denied with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is denied with costs.

“Michael L. Phelan”

Judge

ANNEX

IC07-1 – Taxpayer Relief Provisions

<p>¶ 23. The Minister may grant relief from the application of penalty and interest where the following types of situations exist and justify a taxpayer's inability to satisfy a tax obligation or requirement at issue:</p>	<p>¶ 23. Le ministre peut accorder un allègement de l'application des pénalités et des intérêts lorsque les situations suivantes sont présentes et qu'elles justifient l'incapacité du contribuable à s'acquitter de l'obligation ou de l'exigence fiscale en cause :</p>
<p>(a) extraordinary circumstances</p>	<p>a) circonstances exceptionnelles;</p>
<p>(b) actions of the CRA</p>	<p>b) actions de l'ARC;</p>
<p>(c) inability to pay or financial hardship</p>	<p>c) incapacité de payer ou difficultés financières.</p>
<p>¶ 24. The Minister may also grant relief if a taxpayer's circumstances do not fall within the situations stated in ¶ 23.</p>	<p>¶ 24. Le ministre peut également accorder un allègement même si la situation du contribuable ne se trouve pas parmi les situations mentionnées au paragraphe 23.</p>
<p>¶ 25. Penalties and interest may be waived or cancelled in whole or in part where they result from circumstances beyond a taxpayer's control. Extraordinary circumstances that may have prevented a taxpayer from making a payment when due, filing a return on time, or otherwise complying with an obligation under the Act include, but are not limited to, the following</p>	<p>¶ 25. Les pénalités et les intérêts peuvent faire l'objet d'une renonciation ou d'une annulation, en tout ou en partie, lorsqu'ils découlent de circonstances indépendantes de la volonté du contribuable. Les circonstances exceptionnelles qui peuvent avoir empêché un contribuable d'effectuer un paiement lorsqu'il était dû, de produire une déclaration à temps ou de</p>

examples:	s'acquitter de toute autre obligation que lui impose la Loi sont les suivantes, sans être exhaustives :
(a) natural or man-made disasters such as, flood or fire;	a) une catastrophe naturelle ou causée par l'homme, telle qu'une inondation ou un incendie;
(b) civil disturbances or disruptions in services, such as a postal strike;	b) des troubles publics ou l'interruption de services, tels qu'une grève des postes;
(c) a serious illness or accident; or	c) une maladie grave ou un accident grave;
(d) serious emotional or mental distress, such as death in the immediate family.	d) des troubles émotifs sévères ou une souffrance morale grave, tels qu'un décès dans la famille immédiate.
...	...
¶ 33. Where circumstances beyond a taxpayer's control, actions of the CRA, or inability to pay or financial hardship has prevented the taxpayer from complying with the Act, the following factors will be considered when determining whether or not the CRA will cancel or waive penalties and interest:	¶ 33. Lorsque des circonstances indépendantes de la volonté du contribuable, des actions de l'ARC, ou l'incapacité de payer ou les difficultés financières ont empêché le contribuable de respecter la Loi, les facteurs suivants seront considérés pour déterminer si l'ARC annulera ou renoncera aux pénalités et aux intérêts, ou non :
(a) whether or not the taxpayer has a history of compliance with tax obligations;	a) le contribuable a respecté, par le passé, ses obligations fiscales;
(b) whether or not the taxpayer has knowingly allowed a balance to exist on which	b) le contribuable a, en connaissance de cause, laissé subsister un solde en

arrears interest has accrued; souffrance qui a engendré des intérêts sur arriérés;

(c) whether or not the taxpayer has exercised a reasonable amount of care and has not been negligent or careless in conducting their affairs under the self-assessment system; and c) le contribuable a fait des efforts raisonnables et n'a pas été négligent dans la conduite de ses affaires en vertu du régime d'autocotisation;

(d) whether or not the taxpayer has acted quickly to remedy any delay or omission. d) le contribuable a agi avec diligence pour remédier à tout retard ou à toute omission.

...

...

¶ 103. If a request was denied or partly granted, there is no right of objection for a taxpayer to dispute a decision under the taxpayer relief provisions. However, if the taxpayer believes that the Minister's discretion has not been properly exercised, the taxpayer can write to ask that the director of the tax services office or the tax centre reconsider the original decision and review the situation again. During the second review, the taxpayer will have the opportunity to make more representations for the CRA's consideration. To find the addresses of CRA offices, see ¶ 31.

¶ 103. Si une demande a été refusée ou partiellement acceptée, il n'y a aucun droit de faire opposition au profit d'un contribuable pour contester une décision prise conformément aux dispositions d'allègement pour les contribuables. Cependant, si le contribuable estime que le pouvoir discrétionnaire du ministre n'a pas été exercé correctement, il peut demander, par écrit, que le directeur du bureau des services fiscaux ou du centre fiscal reconsidère la décision initiale et réexamine la situation. Au cours du second examen, le contribuable aura la possibilité de soumettre des observations supplémentaires que l'ARC prendra en considération. Voir le paragraphe 31 pour obtenir les adresses des bureaux de l'ARC.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1890-08

STYLE OF CAUSE: HI-TECH SEALS INC.

and

ATTORNEY GENERAL OF CANADA
(MINISTER OF NATIONAL REVENUE)

PLACE OF HEARING: Edmonton, Alberta

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**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

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