

Federal Court



Cour fédérale

Date: 20100105

Docket: T-393-09

Citation: 2010 FC 5

Ottawa, Ontario, January 5, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

PETER POND HOLDINGS LTD.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision rendered February 12, 2009 by the Minister of National Revenue (the Minister) where the Applicant's request for cancellation of a penalty assessed for failure to remit tax due on a payment made to a non-resident was refused.

Factual Background

[2] Peter Pond Holdings Ltd. (the Applicant) is a provincially incorporated body carrying on business in the province of Alberta as a family-owned investment company. On March 1, 2005, the

Applicant and its shareholders agreed that the Applicant would repurchase the shares belonging to Wendy Levin (the shares) for their fair market value. Both the share repurchase agreement and the resolution of the directors left the purchase amount blank with the understanding that it would be completed upon valuation of the shares.

[3] The valuation of the shares was completed by an accountant on April 20, 2005 and was approved by the Applicant's shareholders on May 3, 2005. As Wendy Levin is a non-resident, the amount of the deemed dividend from the repurchase was subject to withholding tax pursuant to subsection 212(2) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 (the Act). By letter dated May 27, 2005, the Applicant's counsel informed Canada Revenue Agency (CRA) of the details of the transaction. On June 9, 2005, CRA responded in writing and assessed the Applicant for withholding tax of \$151,745.85, along with interest in the amount of \$1,604.92 and a failure to remit penalty of \$15,174.59. The next day, the full amount of the withholding tax, the interest and the penalty were paid to CRA by a cheque dated March 11, 2005 sent with the letter dated May 27, 2005. This cheque was signed and dated March 11, 2005; however, the dollar amount was not inserted at that time by the Applicant.

[4] Subsequently, pursuant to subsection 220(3.1) of the Act, the Applicant made a request to the Minister that the penalty be cancelled (the first fairness request). This was refused on November 10, 2006. An application for judicial review was commenced but was discontinued on the understanding that a second level fairness request would be made. The Applicant's ground for the fairness request was essentially that the fair market value could not be established any earlier

and they did not know the amount of the payment required as it was contingent on the share purchase price being determined. Consequently, the tax was remitted as soon as possible given the circumstances.

[5] On March 27, 2007, a request was made to the Appeals Division of CRA once again requesting that the penalty be cancelled (the second fairness request). It was refused on February 12, 2009. The Applicant now seeks judicial review of that decision.

Contested decision

[6] In her letter, the Minister's delegate indicates that her decision is made further to the first fairness request and subsequent meeting, correspondence and telephone conversations.

[7] The Minister's delegate identifies the following major factors as determinative in supporting the decision:

- The resolution by the board of directors stated that the withholding amount was due by April 15, 2005;
- No changes were made to the preliminary valuation and CRA did not share the view that it was impossible to establish the value of the shares earlier as the majority of the value of the corporation was derived from marketable securities held in an investment account;
- The Act clearly states that the tax must be remitted "forthwith" and administratively CRA allows until the 15th of the following month;

- The penalty is non-discretionary and not open to subjective determinations. It is not reasonable in the circumstances to suggest that the accountant being too busy justifies the late payment of the amounts;
- The fact that all parties wanted a legally effective date of March 7, 2005 due to the fiscal year and the legally effective date was indeed March 7, 2005;
- Knowing the requirement to withhold and remit under Part XIII of the Act, the Applicant had the choice to either remit based on an estimate of the fair market value and apply for a refund under subsection 227(6) or other recourse under subsection 227(7) of the Act or to establish the fair market value, gain shareholder approval, then withhold and remit.

[8] In light of the choices open to the Applicant and the outlined factors, the Minister's delegate does not find that there are extraordinary circumstances that prevented the taxpayer from complying with the Act and the second fairness request is denied.

Issues

[9] The following three questions will be addressed:

- a) Did the Minister's delegate fetter her discretion?
- b) Did the Minister's delegate err by considering irrelevant facts?
- c) Should the Court determine that the decision does not meet the standard of reasonableness, should it direct the Minister to cancel the penalty as requested by the Applicant?

[10] The application for judicial review shall be dismissed for the following reasons.

Relevant legislation

[11] The relevant legislation is attached as Appendix A to these reasons.

Analysis

Standard of review

[12] Both parties submit that the decision should be held to the standard of reasonableness. I agree, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held that existing jurisprudence can be helpful in determining the appropriate standard of review (at paragraph 57). The jurisprudence, previous and subsequent to *Dunsmuir*, has established that the standard of reasonableness applied to the Minister's decision under subsection 220(3.1) of the Act and I am satisfied that this continues to be the appropriate standard (see *Lanno v. Canada (Customs and Revenue Agency)*, 2005 FCA 153, 334 N.R. 348; *Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, 386 N.R. 212 at paragraphs 5 and 24). Accordingly, the Court will only intervene if the decision falls outside of the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at paragraph 47).

Did the Minister's delegate fetter her discretion?

[13] The Applicant alleges that the Minister's delegate fettered her discretion by finding that the Applicant should have remitted the withholding tax by CRA's administrative filing deadline and refusing to cancel the penalty on this ground. He holds that the Minister's delegate was not

permitted to adopt mandatory administrative policies and was required to consider the particular facts presented in order to determine whether to exercise her discretion. He also submits that the statement in the decision that the penalty is "non-discretionary and not open to subjective determinations" is evidence that the Minister's delegate was unwilling to consider the particular facts of this case. Accordingly, the Applicant argues that the decision is unreasonable as it failed to consider the merits of this particular application.

[14] The Respondent contends that the Minister's delegate did not fetter her discretion as she did not treat the administrative policy as a general rule and considered the merit of this particular case. The Respondent further asserts that the Minister's delegate considered CRA's administrative deadline and the mandatory nature of the penalty at the request of the Applicant's legal counsel who submitted that the remittance had been made within the time required by the Act.

[15] Moreover, the Respondent submits that the conclusion that the penalty was properly assessed did not govern the outcome of the Minister's delegate's decision and she considered other factors, as evidenced by her letter, in exercising her discretion. Accordingly, the consideration of the correctness of the penalty does not render her decision unreasonable.

[16] At the outset, I note that throughout these proceedings the Applicant has maintained that it met the requirement under the Act and remitted the withholding amount "forthwith" in accordance with subsection 215(1) and submits that this is an important factor that renders the decision unreasonable. The parties are clearly not in agreement on this issue, however, that is not a decision

that belongs to this Court. Should the Applicant wish to challenge the meaning of the definition of "forthwith" and the correctness of the assessment of the penalty it must do so in the proper forum and not through this judicial review. The Court notes that the definition of "forthwith" was discussed in *Nestlé Enterprises Limited v. Canada (Minister of National Revenue – M.N.R.)*, 92 D.T.C. 1001 by the Tax Court of Canada and determined that it meant "quickly and promptly". It is not for this Court to further the discussion on this issue.

[17] Furthermore, I do not agree with the Applicant that the Minister's delegate fettered her discretion and did not consider the particular facts of the case. A decision-maker will fetter her discretion by automatically following administrative policies and guidelines and refusing to deviate from them in light of the particular facts of a case (*Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, [2008] 1 F.C.R. 385 at paragraph 62). In such a situation, the Court's intervention would be appropriate but that is not the case here.

[18] Despite the fact that the Minister's delegate stated that she considered CRA's administrative guideline and the mandatory nature of the penalty as factors in her decision, she went on to consider other factors related to the unfolding of the share repurchase transaction and the alternative options that she believed were open to the Applicant. She also considered the Applicant's submission that it was impossible for the fair market value to be determined and the withholding amount to be remitted any earlier but disagreed with this position. It is quite clear that the Minister's delegate considered the facts of the case at hand and did not follow the administrative guideline blindly. Consequently, this ground for judicial review cannot succeed.

Did the Minister's delegate err by considering irrelevant facts?

[19] The Applicant advances that the Minister's delegate erred by considering the following facts: the board of director's resolution resolved to withhold and remit the tax due before April 15, 2005; the effective date of the agreement; and the Applicant was aware of its obligation to remit the withholding tax. The Applicant adds that none of these factors affected its ability to remit the tax and thus, should not have been considered.

[20] The Applicant further argues that the Minister's delegate assumed incorrectly that the fair market value of the shares was readily ascertainable and that it could have made the remittance based on an estimate. The Applicant alleges that these are irrelevant considerations that are not supported by the evidence, and as such, render the decision unreasonable. It relies on the decision in *Barron v. Canada (Minister of National Revenue)* (1997), 209 N.R. 392 (F.C.A.) where the Federal Court of Appeal stated that the "Court may intervene and set aside the discretionary decision under review only if that decision was made in bad faith, if its author clearly ignored some relevant facts or took into consideration irrelevant facts or if the decision is contrary to law" (at paragraph 5).

[21] The Respondent underlines that these factors demonstrate that the Minister's delegate weighed various aspects of the transaction in reaching her decision and that weighing facts is at the heart of exercising discretion. Accordingly, it will normally be difficult to persuade a court that a decision maker acted unreasonably in according weight to a particular fact (*Telfer*, at paragraph 33).

[22] In addition, the Respondent submits that the decision overall is reasonable and that the Minister's delegate considered the specific circumstances of the case in determining that the Applicant had not been subject to any extraordinary circumstances that prevented it from complying with its remittance obligations.

[23] The fairness provision under subsection 220(3.1) of the Act allows the Minister to grant relief where it can be shown that a situation exists that justifies the taxpayer's inability to satisfy the requirement at issue. In this case, the Applicant has claimed that it was impossible to determine the fair market value of the shares and the share purchase price any earlier than was done principally because it was a busy time for their accountant (see page 8, Applicant's record, affidavit of Allan Robertson, Applicant's accountant, at paragraph 10). He claims that as a consequence of this, it could not remit the withholding amount any earlier and the penalty should be cancelled.

[24] In Information Circular IC-92-2, "Guidelines for the Cancellation and Waiver of Interest and Penalties" (March 18, 1992), it is mentioned that penalties and interest may be waived or cancelled in whole or in part where they result in circumstances beyond a taxpayer's control. It gives examples of extraordinary circumstances that may have prevented the taxpayer from making a payment when due. The taxpayer can make a request for cancellation and must provide the reasons why the interests or penalties levied, or to be levied, were primarily caused by factors beyond his control. In its determination whether or not there should be a cancellation, CRA will consider certain factors, and one of them is whether or not the taxpayer has exercised a reasonable amount of

care and has not been negligent or careless in conducting its affairs under the self-assessment system.

[25] The Court is of the opinion that the reasons provided in the answer to the second level fairness request are clear, reasonable, justifiable and based on the evidence. The Court's intervention is not warranted.

Should the Court determine that the decision does not meet the standard of reasonableness, should it direct the Minister to cancel the penalty as requested by the Applicant?

[26] In light of my answers to the first two questions, it is unnecessary to analyze the third one.

[27] Both parties submitted submissions on costs. In exercising its discretion, the Court will grant costs to the Respondent by way of a lump sum for an amount of \$2,000.00 inclusive of disbursements and GST.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. Costs are awarded to the Respondent by way of a lump sum for an amount of \$2,000.00 inclusive of disbursements and GST.

“Michel Beaudry”

Judge

APPENDIX A

Relevant Legislation

Income Tax Act, R.S.C. 1985 (5th Supp.), c. 1.

215. (1) When a person pays, credits or provides, or is deemed to have paid, credited or provided, an amount on which an income tax is payable under this Part, or would be so payable if this Part were read without reference to subsection 216.1(1), the person shall, notwithstanding any agreement or law to the contrary, deduct or withhold from it the amount of the tax and forthwith remit that amount to the Receiver General on behalf of the non-resident person on account of the tax and shall submit with the remittance a statement in prescribed form.

227. (9) Subject to subsection 227(9.5), every person who in a calendar year has failed to remit or pay as and when required by this Act or a regulation an amount deducted or withheld as required by this Act or a regulation or an amount of tax that the person is, by section 116 or by a regulation made under subsection 215(4), required to pay is liable to a penalty of

(a) subject to paragraph (b), if

(i) the Receiver General receives that amount on or before the day it was due, but that amount is not paid in the manner required, 3% of that amount,

(ii) the Receiver General receives that amount

(A) no more than three days after it was due, 3% of that amount,

(B) more than three days and no more than five days after it was due, 5% of that amount, or

215. (1) La personne qui verse, crédite ou fournit une somme sur laquelle un impôt sur le revenu est exigible en vertu de la présente partie, ou le serait s'il n'était pas tenu compte du paragraphe 216.1(1), ou qui est réputée avoir versé, crédité ou fourni une telle somme, doit, malgré toute disposition contraire d'une convention ou d'une loi, en déduire ou en retenir l'impôt applicable et le remettre sans délai au receveur général au nom de la personne non-résidente, à valoir sur l'impôt, et l'accompagner d'un état selon le formulaire prescrit.

227. (9) Sous réserve du paragraphe (9.5), toute personne qui ne remet pas ou ne paye pas au cours d'une année civile, de la manière et dans le délai prévus à la présente loi ou à son règlement, un montant déduit ou retenu conformément à la présente loi ou à son règlement ou un montant d'impôt qu'elle doit payer conformément à l'article 116 ou à une disposition réglementaire prise en application du paragraphe 215(4) est passible d'une pénalité :

a) soit, sous réserve de l'alinéa b) :

(i) si le receveur général reçoit ce montant au plus tard à la date où il est exigible, mais que le montant n'est pas payé de la manière prévue, de 3% du montant,

(ii) si le receveur général reçoit ce montant :

(A) au plus trois jours après la date où il est exigible, de 3% du montant,

(B) plus de trois jours mais au plus cinq jours après la date où il est exigible, de 5% du

	montant,
(C) more than five days and no more than seven days after it was due, 7% of that amount, or	(C) plus de cinq jours mais au plus sept jours après la date où il est exigible, de 7% du montant,
(iii) that amount is not paid or remitted on or before the seventh day after it was due, 10% of that amount; or	(iii) si ce montant n'est pas payé ou remis au plus tard le septième jour suivant la date où il est exigible, de 10% du montant;
(b) where at the time of the failure a penalty under this subsection was payable by the person in respect of an amount that should have been remitted or paid during the year and the failure was made knowingly or under circumstances amounting to gross negligence, 20% of that amount.	b) soit de 20 % du montant qui aurait dû être remis ou payé au cours de l'année si, au moment du défaut, une pénalité en application du présent paragraphe était payable par la personne et si le défaut a été commis sciemment ou dans des circonstances équivalant à faute lourde.
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, 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.	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 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.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Chad Brown FOR THE APPLICANT

Gregory Perlinski FOR THE RESPONDENT

SOLICITORS OF RECORD:

Felesky Flynn LLP FOR THE APPLICANT
Edmonton, Alberta

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General
Ottawa, Ontario