Federal Court **Cour fédérale**

Date: 20110821

Docket: T-260-10

Citation: 2011 FC 1014

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 21, 2011

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

PAVAGE ST-EUSTACHE LTÉE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] This is an application for judicial review filed by the applicant Pavage St-Eustache Ltée (Pavage), a member of the Mathers Group, of the decision rendered on February 2, 2010, by the Canada Revenue Agency, Montréal Tax Services Office (the Agency) dismissing a request for relief dated September 3, 2009, from Pavage under subsection 220(3.1) of the *Income Tax Act* (the Act).

[2] Section 220(3.1) of the Act provides:

> Waiver of penalty or interest
>
> (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.
>
> [Emphasis added.]

> Renonciation aux pénalités et aux intérêts
>
> (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.
>
> [Notre soulignement]

[3] The reassessment issued by the Agency on May 26, 2004, for Pavage's fiscal year ending December 31, 1996, is the central issue between the parties. This reassessment formally disallowed the deduction of $1,128,454 for a farm loss (the farm loss) claimed by Pavage for the 1996 taxation year that the Agency had provisionally allowed.

[4] The reassessment of May 26, 2004, increased Pavage's payable taxes by $341,805 on its business income for 1996 plus interest on arrears of $299,565 and interest on a reimbursement of $10,080.77 for a total of $651,450.77.

[5] The issuance of this reassessment was provided under the terms of a civil and penal settlement agreement (the agreement) entered into on November 25, 2002, between the Mathers Group companies and the Agency following an investigation by the Agency begun in 1998. Article 8 of the agreement covers Pavage. It confirms the Agency's reassessment of February 14, 2002, which, for the first time, disallowed the farm loss claimed by Pavage.

II. The request for relief dated September 3, 2009

[6] This request for relief is part of a proposal made by Mr. Paci, counsel for Pavage, in his letter of September 3, 2009, to Claudine Vinette of the Agency's Montréal office. He stated the following:

[TRANSLATION]

> Following our recent discussions relating to the matter of ending this imbroglio, please note that we have received instructions to propose to you a full and final settlement that would consist in paying the total assessment amount of May 26, 2004, or of $341,805 without penality or interest, less the amounts withheld by the CRA.
> [Emphasis added.]

[7] Mr. Paci pointed out that [TRANSLATION] "this statement is made in the context of a fairness request justified by the extraordinary circumstances surrounding this file, in particular:

- The death of the lawyer representing the company originally, Bruno J. Pateras, Q.C., on April 13, 2002;
- The prolonged absence of the investigator in charge of the file, Marcel Kessiby, due to health problems;

- The issuance of a notice of assessment May 26, 2004, 18 months after the date of the original settlement;

- The fact that the said notice of assessment was never delivered to our client, Pavage St-Eustache Ltd, or to our office, or to the investigator in charge of the file, Marcel Kessiby, who was supposed to be aware of any notice of reassessment in the Mathers Group file;

- In addition, the table summarizing all notices of assessment issued since December 31, 1996, to December 31, 2006, which was attached to the CRA's letter of September 25, 2007 (see tab 5), making no reference to the notice of reassessment issued in May 2004. The above-noted table had been previously sent by the Shawinigan Collections Branch and it had been received at the Enforcement Division in Laval on September 13, 2007, all at the request of Mr. Kessiby;

- Given the circumstances, our client could not have guessed that such a notice of reassessment, which had not even been recorded in CRA's receivables, existed;

- The receipt of a reconciliation from Mr. Kessiby dated September 25, 2007, and the immediate payment of final amounts due by our client according to this document, are evidence that the said notice of reassessment of May 26, 2004, did not exist at that moment for neither for our client nor for Mr. Kessiby;

- The many undue delays caused by CRA in tracking down a copy of the notice of reassessment dated May 2004, locating the missing explanatory document and informing the undersigned that these documents existed, caused our client serious prejudice;

- Furthermore, if the CRA taken due care in issuing the notice of reassessment, there would not have been any undue delays, therefore no interest nor penalties to add to the reassessment;

- The lack of co-operation of certain individuals from CRA identified to replace Marcel Kessiby during his illness, specifically Réal Barbeau."

III. The Agency's decision

[8] On February 2, 2010, Francine Laporte, Team Leader, Revenue Collections, in Montréal, rejected Pavage's proposal of September 3, 2009, on three grounds stated in its letter addressed to counsel for Pavage:

a. Pavage's request for relief is time-barred. Ms. Laporte writes:

[TRANSLATION]

> Under the proposed amendments, announced in the March 2004 Federal Budget and legislated on May 13, 2005, the Minister's discretionary power in a request for relief only applies to the applications filed for a taxation year ending during the previous ten calendar years. For example, as of January 1, 2010, a request filed in 2010 would be accepted only for taxation years 2000 and following. However, your application concerns the 1996 taxation year.

b. Pavage knew that the reassessment of May 26, 2004, had been issued. Her view is the following

[TRANSLATION]

> Furthermore, the review of the file confirms that several statements of account subsequent to the notice of assessment of May 26, 2004, were sent to your client, such as the statement of interest assessed on May 26, 2004, and a statement of arrears on September 30, 2004, that showed the total arrears claimed for the fiscal year ended December 31, 1996. In this regard, no mail was returned.

c. According to the provisions of the agreement of November 25, 2002, Pavage had waived a fairness claim. She stated the following:

[TRANSLATION]

> Finally, we draw your attention to point 18 of the *civil and penal settlement proposal* dated November 25, 2002, which states that withdrawal of a right of appeal and the waiver of a fairness claim should accompany it.

[9] Considering its importance, I reproduce article 18 of the November 25, 2002, agreement:

[TRANSLATION]

> 18. A waiver of the right of appeal and a waiver of a fairness claim must accompany the final proposed settlement. The withdrawal of the right of appeal and waiver of fairness should be applied in its entirety to all "CCRA" Tax Services offices, without reservation. In the event of failure to comply with the withdrawal of right of appeal and waiver of fairness by the natural or legal persons involved in the final proposed settlement, the reassessments will be cancelled and renewed according to the notices of assessment issued between March 2000 and February 2002, all in compliance with the results of the "CCRA".
> [Emphasis added.]

IV. The impact of *Bozzer v. Her Majesty et al*.

[10] *Bozzer v. Her Majesty The Queen in Right of Canada, Canada Revenue Agency and The Attorney General of Canada*, 2011 FCA 186 (Bozzer), was rendered by the Federal Court of Appeal on June 2, 2011, during my deliberation.

[11] Counsel for the Agency thinks that *Bozzer* [TRANSLATION] "has the effect of changing the state of the law as to the issue of presumption." He is of the view that

[TRANSLATION]

> Indeed, the Court of Appeal found that an applicant may apply for relief for a period of 10 years prior to filing the application, regardless of the tax year in question. Thus, the right of an applicant to file such an application, for all practical purposes, cannot be time-barred.
>
> However, as the decision of the Minister of National Revenue was not based solely on the limitation period, but also on Pavage's waiver from requesting relief, it is our view that a determination can still be rendered in our case. [Emphasis added.]

[12] The following day, counsel for Pavage advised this Court as follows:

[TRANSLATION]

> Further to the letter of July 4, 2011, from our colleague, Louis Sébastien, this is to share with the Honourable Mr. Justice Lemieux that the respondent cannot invoke the "waiver" contained in the parties' agreement since he has not himself complied with the *exceptio non adimpleti contractus*. [Emphasis added.]

[13] In *Bozzer*, the issue was how the 10-year limitation in section 220(3.1) of the Act must be calculated. The Federal Court of Appeal's reasons were written by Justice Stratas and at this the time are only available in English.

[14] On December 6, 2005, Mr. Bozzer filed a request for relief of interest accrued on unpaid taxes for the 1989 and 1990 taxation years. The Agency had denied the request because it had been filed late, that is, more than 10 years after his 1989 and 1990 taxation years. According to the Agency, under section 220(3.1), the Minister, in such circumstances, had no discretion to cancel or waive interest.

[15] Ms. Laporte dismissed Pavage's application for the same reasons.

[16] The application for judicial review in *Bozzer* was dismissed by a Federal Court judge for the reason that the 10 year period is calculated after the relevant taxation year, i.e. the assessment year (in our case, 1996). Justice Stratas was of the view that "the ten year period in subsection 220(3.1) does not start in the year of assessment". According to Justice Stratas, subsection 220(3.1) permits the Minister to exercise his discretion to waive interest accrued in any taxation year ending within 10 years before the taxpayer's request for relief, regardless of when the underlying tax debt arose.

[17] In this case, Justice Stratas' interpretation means that the Agency had the discretion to waive the interest accrued between January 1, 1999, and December 31, 2009, after the tax debt arose for Pavage's 1996 taxation year by the May 26, 2004, reassessment.

[18] In the circumstances, I find that counsel for the Agency was right to conclude that *Bozzer* meant that the manner in which the Agency applied the limitation period for Pavage's application was wrong. The discretion given to the Agency to grant tax relief to Pavage had not expired.

[19] Consequently, I find it unnecessary to address the debate on limitation as described by the parties in their arguments. The sole issue to be discussed is whether the Agency could rely on the waiver in paragraph 18 of the agreement. However, I find the issue of whether and when Pavage was unaware that the May 26, 2004, reassessment existed is still relevant if my finding on waiver is not correct because this issue is attached to the discoverability principle or the impossibility of acting principle (see *Novak v. Bond*, [1999] 1 S.C.R. 808; and *Location Robert Ltée v. Canada* 2010 FCA 31). In other words, the discoverability principle could possibly push the relief request date from September 13, 2009, to a later date.

V. The parties' arguments

(A) Pavage

(i) Pavage's awareness of the existence of the May 26, 2004, notice of assessment

[20] Pavage claims that there is no evidence in the file demonstrating that Pavage or its representatives had received this notice of assessment. Pavage stated that the investigator in charge of the file, Marcel Kessiby, was not aware of its existence and processed the files without taking

into account this notice of reassessment, which is confirmed by the fact that no enforcement measures were taken before December 31, 2006.

[21] Pavage called the Agency's reasoning erroneous for having refused relief based on the fact that the applicant had allegedly received account statements subsequent to the notice of assessment of May 26, 2004, since it neglected to mention that none of the statements of account received by Pavage referred to this notice of assessment and that there was no way for Pavage to know since it had never received the notice of May 26, 2004.

[22] In addition, Pavage had advised Marcel Kessiby of the existence of statements of account and he should have informed Pavage that the necessary adjustments would be corrected in compliance with the agreement.

(ii) The agreement

[23] Pavage also qualified the Agency's reasoning as erroneous for because it refused Pavage's relief request based on article 18 of the agreement.

[24] According to Pavage, this reasoning is faulty because its claim (the request for relief) is based on the fact that the Agency did not comply with the terms of the agreement (amended on November 28, 2002) since article 8 of the agreement was subject to paragraphs 10(*a*), 23 and 24 of the agreement and its amendment of November 28, 2002.

[25] Furthermore, according to Pavage;

(1) the notice of assessment of May 26, 2004, is not justified because the taxes claimed by this notice were to be calculated in the total amount mentioned in paragraph 11(*a*) of the agreement and that the remedies mentioned in paragraph 8 are already part of the agreement of November 25, 2002, modified on November 28, 2002;

(2) Paragraph 23 of the agreement mentions that there is no interest on the companies mentioned, including Pavage, and, consequently, the notice of May 26, 2004, could not charge interest; and

(3) Paragraph 24 of the agreement assigns any discrepancies arising from the reassessments to the Agency

[26] To support its judicial review, Pavage filed affidavits by Mr. Paci and Marcel Kessiby. They were cross-examined.

[27] In his affidavit, Mr. Paci stated that

a. On September 25, 2007, he received from Marcel Kessiby a summary reconciliation of Pavage's accounts, indicating that the final amount due from Pavage on September 12, 2007, was $21,502 and that on October 2, 2007, Pavage paid the amount claimed;

b. On February 14, 2008, he wrote to the Assistant Director of the Agency's Enforcement Division in which he mentioned the payment of $21,502 but that

despite that, [TRANSLATION] “our client continued to receive monthly statements of arrears”;

c. Following this correspondence, Ms. Vinette was reassigned to the file and [TRANSLATION] “after several months of exhaustive searching in the file” Ms. Vinette [TRANSLATION] “finally traced the origin of the aforementioned statement of arrears” and that, on November 14, 2008, she sent him a copy of the notice of assessment of May 26, 2004, which was incomplete because the additional explanations were not included in the notice; he received them on December 19, 2008; and

d. Since April 30, 2007, the Agency deducted, as compensation from amounts due to Pavage, the amount of $650,233.

[28] In his affidavit, Marcel Kessiby swore to (1) the start of his employment at the Agency in 1981 and his retirement on September 28, 2007; and (2) his responsibility as investigator in the family’s and the Mathers Group’s concerns.

[29] He filed the agreement of November 25, 2002, amended on November 28, 2002, and on March 30, 2003 (applicant’s record, pages 24 and 26).

[30] In paragraph 15 of his affidavit, Marcel Kessiby acknowledged that article 8 of the agreement upholding a decision previously made by the Agency rejecting the farm loss of

$1,128,454 and at the following paragraph states that [TRANSLATION] " in accordance with this article [article 8] of the agreement, a notice of reassessment was issued by the Agency dated May 26, 2004." However, he states that he was unaware of the existence of this notice of reassessment (paragraph 17) and [TRANSLATION] "therefore, I continued to process the file without taking into account this new notice of assessment" (paragraph 18).

[31] Marcel Kessiby concluded his affidavit stating that the notice of assessment of May 26, 2004, did not meet the terms of the agreement. At paragraph 43 of his affidavit, he supported Mr. Paci's conclusions, reproduced in paragraph 25 of these reasons.

(B) The Agency

(i) Awareness of the notice of assessment of May 26, 2004

[32] The Agency relies on the provisions of subsections 244(14) and (15) of the Act that, according to it, set out presumptions that the notice of May 26, 2004, was sent on that day to Pavage. The provisions read as follows:

> Mailing or sending date
>
> (14) For the purposes of this Act, where ... any notice of assessment or determination is mailed, ... it shall be presumed to be mailed or sent, as the case may be, on the date of that notice or notification.
>
> Date when assessment made
>
> (15) Where any notice of assessment or determination has been sent by the Minister as required by this Act, the assessment or determination is deemed to have been made on the day of mailing of the notice of the assessment or determination. [Emphasis added.]

[33] The Agency argued that the discoverability or impossibility of acting principles were not established by Pavage since the predominant evidence in the record is that Pavage was aware of the notice of reassessment of May 24, 2004, and in any case, Pavage was aware that the Agency would have to reject the farm loss.

[34] The Agency added that the purpose of the agreement is the final penal and civil settlement of the Agency's numerous assessments as part of its investigation into the Mathers Group's actions, including the issue of farm loss claimed by Pavage for its 1996 taxation year.

(ii) Compliance with the agreement

[35] On the issue raised by Pavage that the reassessment of May 24, 2004, did not comply with the agreement, the Agency argued the opposite and added that, in any event, this has no relevance in determining the two issues, i.e. limitation and waiver of filing a fairness application within this agreement. The Agency also claims that Mr. Kessiby acknowledged in his affidavit that the assessment was issued in compliance with the agreement.

[36] To support its claims, the Agency filed the affidavit by Guy Léonard, the investigator and acting team leader at the Agency, on which he was not cross-examined. He stated that he consulted documents regarding the companies in the Mathers Group from approximately 77 boxes at the Agency. I will summarize the essential points of his affidavit.

[37] The Agency also filed an affidavit by Francine Laporte on May 4, 2010, which she was also not cross-examined upon.

[38] Guy Léonard listed and explained that all the notices of reassessment issued by the Agency against Pavage for the 1996 taxation year, and in particular:

a. The notice of February 14, 2002, which disallowed for the first time, among other things, the farm loss claimed by Pavage; and

b. The notice of February 19, 2003, which cancels that of February 14, 2002.

According to Guy Léonard:

[TRANSLATION]

> The purpose of this was to re-establish the adjustments as assessed by the March 7, 2001, assessment, i.e. at the time when the farm loss had not been disallowed, contrary to what paragraph 8 of the agreement of November 25, 2002, as it appears from the agreement in Exhibit A of the affidavit by Marcel Kessiby dated March 18, 2010. [Emphasis added.]

c. The notice of May 26, 2004, in which [TRANSLATION] "the Agency disallowed again the farm loss as it appears in report T99A prepared by Paul-André Drolet, the auditor who issued the assessment of May 26, 2004.

[39] As to the participation of Marcel Kessiby in the issuance of the notice of reassessment of May 26, 2004, Guy Léonard wrote:

[TRANSLATION]

> As of December 2003, Marcel Kessiby was working on issuing a reassessment for the 1996 taxation year, a notice of reassessment that was eventually issued on May 26, 2004, since he prepared, on January 14, 2004, an audit report (called T-20) for this purpose. This

> report states that the farm loss would be disallowed in compliance with the agreement of November 25, 2002, as it appears in the report I attached as Exhibit "7" of my affidavit. [Emphasis added.]

[40] In paragraph 6 of his affidavit, Guy Léonard stated that the notice of reassessment of May 26, 2004, complied with the November 25, 2002, agreement in that (1) the parties have always agreed that the farm loss would be rejected; (2) the amount of $2,502,324 established at the end of the agreement of November 25, 2002, did not include the adjustment of the future assessment of May 26, 2004, according to a chart prepared by Marcel Kessiby on or around March 17, 2003 (see his Exhibit 11); (3) from November 25, 2002, to March 10, 2003, the Agency did not charge interest on Pavage's debt in compliance with the agreement of November 25, 2002, and a first amendment of November 28, 2002. However, On March 11, 2003, the Agency chose to assess the interests of Pavage and the other companies in the Mathers Group on the unpaid balance in accordance with a new amendment of March 20, 2003, since Pavage had not yet paid the amounts required.

[41] Guy Léonard ended his affidavit by noting that the conciliation of September 12, 2007, to which Marcel Kessiby refers at paragraph 31 of his affidavit of March 28, 2010, was incomplete because it only constituted the last two pages of the 13-page e-mail sent by André Ruoette of the Shawinigan Tax Centre and who, on page two of his e-mail referred specifically to the assessment issued on May 26, 2004 (see Exhibit 13 of Guy Léonard's affidavit).

VI. Analysis

(A) Standard of review

[42] Relying on the Federal Court of Appeal in *Lanno v. Canada* (*Customs and Revenue Agency*), 2005 FCA 153, Pavage argued that the standard of review on the discretionary decisions

rendered under the Act's fairness provisions is that of reasonableness and that, in the circumstances of this case, the February 2, 2010, decision was not reasonable for the following reasons:

(1) The decision-maker did not consider all the circumstances beyond Pavage's control, resulting in it not being aware of the May 26, 2004, notice of assessment before the limitation period.

(2) The decision-maker did not consider that the Agency had not exercised a reasonable amount of care in the circumstances and, specifically, that it was because of the Agency that Pavage believed that it had fulfilled all his obligations following the November 2002 agreement.

(3) The decision-maker did not apply the applicable guidelines citing *Cole v. Canada* (*Auditor General*), 2005 FC 1445.

[43] The Agency submits that that the applicable standard of review is correctness because the issue of review centres on a question of law, that is, the interpretation of the Act. The Agency recognizes that, normally, exercising discretion is reviewed on a reasonableness standard, except if it is an issue of legislative interpretation.

[44] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, changed the law with respect to the standard of judicial review. I find that this decision established the following principles:

(1) Pure questions of law are reviewable on a correctness standard.

(2) The issue of whether a court exercised its discretion appropriately in law is reviewable on a standard of reasonableness.

(3) A decision based on a question of fact is reviewable on the standard of reasonableness with the qualification made by the Supreme Court of Canada decision in *Canada* (*Citizenship and Immigration*) *v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 on the significance of section 18.1(4)(*d*) of the *Federal Courts Act*.

[45] In this case, I find that:

a. The issue of limitation is moot because of *Bozzer*.
b. The issue of whether the Agency complied with the agreement is a mixed question of fact and law reviewable on the standard of reasonableness.
c. The issue of whether the discoverability principle is applicable is a question of fact reviewable on the standard of reasonableness.

(B) <u>Findings</u>

[46] I have two issues to determine: (1) Did the Agency comply with the agreement, and; (2) was the discoverability principle established?

[47] I think that the first issue is relevant to Pavage's request for relief and I find that the evidence filed by the Agency clearly demonstrates that the notice of assessment of May 26, 2004, complies with the agreement. I list this evidence:

a. The purpose of the notice of assessment of May 26, 2004, was to disallow the farm loss. The agreement is clear on this point.

b. Marcel Kessiby acknowledges that the reassessment of May 24, 2004, had to be issued and that the effect of it was to create a debt of $341,805 payable by Pavage and also that interests could be payable (see his cross-examination cited by the Agency in the respondent's record, at paragraph 28(*e*), page 243).

c. The Agency did not charge interest to Pavage's debt in compliance with the agreement of November 25, 2002, and its first amendment, but nevertheless, on March 11, 2003, it chose to assess the interest of Pavage and the other companies of the Mathers Group on the unpaid balance in compliance with the amendment of March 20, 2003 (affidavit of Guy Léonard, at paragraph 6).

d. The amount of $2,502,324 established for the purposes of the November 25, 2002, agreement on the Mathers Group debt did not include the future assessment of May 26, 2004, as appears in a chart prepared by Marcel Kessiby on or around March 17, 2003 (affidavit of Guy Léonard, respondents' record, page 26, at paragraph e).

[48] As to whether the discoverability principle could benefit Pavage, I agree with the counsel for the Agency that Pavage was sufficiently aware that the notice of reassessment of May 26, 2004, had been issued to enable it to act by requesting relief subject to the issue of the waiver. This awareness results from the numerous documents that the Agency sent to Pavage, always at the same

address at 400 Hector Lanthier Street, St. Eustache, Quebec. Pavage did not deny that the documents were received.

[49] In his memorandum of fact and law, counsel for the Agency listed this documentation at paragraph 11, page 233 to 236. In my view, the most relevant documents are found in the following of Francine Laporte's exhibits: (1) Exhibit B, page 11 dated December 30, 2004, (2) Exhibit C, page 16, and; (3) Exhibit D, page 22 of the respondent's record and Exhibit 10 of Guy Léonard's affidavit, on page 85.

[50] For these reasons, the judicial review must be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed with costs.

"François Lemieux"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-260-10
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