

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120215

Docket: A-398-10

Citation: 2012 FCA 55

**CORAM: SHARLOW J.A.
DAWSON J.A.
TRUDEL J.A.**

BETWEEN:

PETER LIVADITIS

Appellant

and

CANADA REVENUE AGENCY

Respondent

Heard at Calgary, Alberta, on February 15, 2012.

Judgment delivered from the Bench at Calgary, Alberta, on February 15, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

TRUDEL J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Calgary, Alberta, on February 15, 2012)

TRUDEL J.A.

[1] Mr. Livaditis (the appellant) unsuccessfully applied to the Minister of National Revenue (or the Minister's Delegate) for relief under the Voluntary Disclosures Program (VDP) seeking relief from penalty and interest with respect to a previously undisclosed capital gain for the 2006 taxation year. His request was denied at the second level by the Minister's Delegate because "enforcement was taken on the account prior to the disclosure" (decision of the Minister's Delegate, appeal book at page 107).

[2] The appellant's ensuing application for judicial review was dismissed by the Federal Court (2010 FC 950).

[3] In his reasons, the Federal Court Judge (the Applications Judge) reviewed the impugned administrative decision in light of the two following questions addressed by the Minister's Delegate (VDP Second Review Report, appeal book at page 153) :

1) Was any direct contact by a CRA employee, other authority or administration, for any reason relating to non-compliance (e.g. unfiled returns, audit, collection issues) made with the taxpayer or is the taxpayer likely to have been aware of the enforcement action?

2) Was any enforcement action initiated against a person associated with, or related to, the taxpayer or a third party, where the enforcement action is sufficiently related to the present disclosure and is likely to have uncovered the information being disclosed?

[4] These questions stem from Circular IC00-1R2 with respect to the VDP and the VDP Guidelines 2008-06, June 2008, which lists the four conditions to be met for a disclosure to be qualified as valid, the first one being that it must be voluntary in the sense that both questions above must be answered in the negative. Whether the disclosure was voluntary is the sole issue surrounding the disclosure made by the appellant.

[5] To dispose of this appeal, few facts are needed. Suffice to know that the appellant was the President of LaCaille Fifth Avenue Inc. (LaCaille), a company whose business included a new

residential condominium project (Five West). In 2003, before construction began, the appellant and four of his family members personally acquired condominium units in the Five West project. In 2006, prior to the completion of the project, they resold these units for a gain. The appellant realized a capital gain that went unreported.

[6] On August 26, 2008, the Minister of National Revenue sought from the Federal Court an Order *ex parte* in order to impose on LaCaille a Requirement to Provide Information and Documents (the Requirement) pursuant to subsection 231.2(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and subsection 289(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 relating to a group of unnamed persons. The purpose of this Requirement was to verify tax compliance by purchasers of units in the Five West project.

[7] The Order sought was issued by the Federal Court on September 4, 2008 (docket T-1330-08, appeal book at page 76) but was not served until November 2008.

[8] Meanwhile, on October 28, 2008, the appellant received a phone call from a representative of the Canada Revenue Agency (CRA). As the appellant recollects it, the conversation was "very brief and general" and served to inform him that the CRA sought a meeting to gather "information pertaining to purchasers who may have acquired condominium units in the Five West project" (appellant's affidavit, appeal book at page 28). The respondent's recollection of the same conversation is said to be somewhat inconsistent but could reasonably be considered only to be more detailed (see VDP Second Review Report, appeal book at pages 150 and f.).

[9] In an event, the telephone conversation between the CRA's representative and the appellant was followed on October 31 by a no-name disclosure for income tax purposes for the 2006 taxation year wherein the unnamed person, later identified as being the appellant, stated that he was "not aware of any audit or enforcement measure being conducted on matters specifically involving the disposition at the time of this letter". Therefore, the appellant asserted that the disclosure was voluntary.

[10] As already stated, the Minister's Delegate disagreed. So did the Applications Judge who partially agreed with the Minister's Delegate.

[11] The Minister's Delegate answered favourably both questions mentioned above. On the first one, he concluded that as a result of the October 28, 2008 telephone conversation, the appellant was fully aware of the information sought by the CRA and how "it would uncover that [the appellant] and members of his family did not report any income resulting from the sales of condos in [the Five West project]" (VDP Second Level Report, appeal book at page 153).

[12] The Applications Judge held that this finding was unreasonable because the Minister's Delegate had failed to provide a rationale for accepting the CRA representative's account of the telephone conversation rather than that of the appellant (Applications Judge's reasons at paragraphs 29 and 32). We respectfully disagree with the Applications Judge for reasons given later.

[13] On the second question, the Applications Judge found that it was reasonable for the Minister's Delegate to have found that the Requirement constituted an enforcement action as this second ground for finding the disclosure not voluntary did not require that the appellant be aware of the existence of an enforcement action. The appellant strongly opposes this conclusion. However, we need not comment on this statement to dispose of this appeal and decline to do so.

[14] We are all of the view that the evidence on record supported the conclusion of the Minister's Delegate as to the appellant's awareness on October 28 of an enforcement action set to be conducted by the CRA with respect to the information being disclosed. There existed a reasonable basis upon which the Minister's Delegate could have decided as he did and this Court will not interfere (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61).

[15] In conclusion, we agree with the judgment under appeal. Therefore, the appeal will be dismissed with costs.

"Johanne Trudel"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-398-10

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Canada Revenue Agency

PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: February 15, 2012

REASONS FOR JUDGMENT OF THE COURT BY: (SHARLOW, DAWSON, TRUDEL
J.J.A.)

DELIVERED FROM THE BENCH BY: TRUDEL J.A.

APPEARANCES:

John Blair FOR THE APPELLANT
Patrick Lindsay

Wendy Bridges FOR THE RESPONDENT

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP FOR THE APPELLANT
Calgary, Alberta

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada