Federal Court Cour fédérale

Date: 20180920

Docket: T-2032-15

Citation: 2018 FC 936

Montréal, Quebec, September 20, 2018

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

RON FINK

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Mr. Ron Fink, seeks judicial review of the decision rendered on October 28, 2015 by Mr. Geoff Trueman, Assistant Commissioner of the Legislative Policy and Regulatory Affairs Branch of the Canada Revenue Agency [CRA]. On behalf of the Minister of National Revenue, Mr. Trueman refused to recommend to the Governor in Council the remission

of Mr. Fink's 2007 tax liability under subsection 23(2) of the *Financial Administration Act*, RSC 1985, c F-11 [FAA].

[2] For the reasons that follow, the application for judicial review is dismissed.

II. Background

[3] On May 26, 2004, Mr. Fink participated in an employee stock option plan offered by his employer, ZCL Composites Inc. [ZCL]. He was granted a warrant certificate entitling him to purchase 75,000 common shares of ZCL's capital stock at a cost of $0.95 per share. The expiry date of the warrant certificate was September 27, 2007.

[4] On March 22, 2007, Mr. Fink exercised the warrant and acquired 75,000 common shares at the subscription price. On that date, the closing price quoted on the Toronto Stock Exchange [TSX] for the shares was $13.70 per share. As a result of purchasing the shares at less than their fair market value, Mr. Fink was assessed a taxable employment benefit pursuant to section 7 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA] for the 2007 taxation year in the amount of $956,250, or $12.75 per share. This amount represented the difference between the fair market value of the shares on the purchase date of $13.70, and the option price of $0.95 per share.

[5] Mr. Fink objected to the assessment and ultimately filed an appeal to the Tax Court of Canada. He argued that since the shares acquired were subject to numerous blackout periods and he was considered an insider of ZCL for the purposes of the TSX and relevant shares legislation and regulations, the assessed value of the shares should not be more than 60% of the trading

price on the date of purchase. Mr. Fink's employment benefit was eventually reduced on consent by 30%, such that the remaining employment benefit was assessed to be $648,000.

[6] In the meantime, Mr. Fink sold his ZCL shares on March 22, 2011 for $3.05 per share or $228,750 in total, thereby realizing a capital loss on the purchased shares in the amount of $419,250. Due to the operation of the employee stock option rules and the ITA, Mr. Fink was unable to claim this capital loss to offset the $648,000 stock option employment benefit. As a result, Mr. Fink was liable to pay federal and provincial income taxes on the stock option employment benefit in the amount of $187,920 and $64,800 respectively, for a total of $252,720.

[7] By letter dated July 23, 2013 to the Minister of National Revenue and the Governor General of Canada, Mr. Fink made a request for remission of the income taxes and interest arising from the employment benefit he received through the stock option plan. To support his request, Mr. Fink submitted that the Governor in Council had granted, and expressed an intention to grant relief in circumstances similar to his. Mr. Fink referred to two (2) remission orders providing relief to taxpayers, who, like him, were unable to offset taxable employment benefits with a subsequent capital loss on the sale of employee stock purchase shares: the *Certain Former Employees of SDL Optics, Inc. Remission Order*, P.C. 2007-1635, October 25, 2007 and the *Certain Former Employees of SDL Optics, Inc. Remission Order No. 2*, P.C. 2008-975, May 29, 2008 [collectively, the SDL Remission Orders]. Mr. Fink also relied on the statements made by the Minister of National Revenue before the Standing Committee of Finance on March 12, 2008, indicating that taxpayers in circumstances similar to those of the SDL employees should make a remission request. Mr. Fink argued that his circumstances were analogous to those of the SDL

employees, and as a result, he should be granted the same relief. Mr. Fink further submitted that his circumstances fell within the "financial setback coupled with extenuating factors" guideline set out in the CRA Remission Guide [Remission Guide]. He argued that the amount of $252,720 in taxes payable, plus interest, was a significant amount of tax for him to pay and that his inability to sell his shares as and when he would have liked due to his "insider status" and blackout periods, were personal extenuating factors beyond his control.

[8] Officials from the CRA's Remissions and Delegations Section of the Legislative Policy Directorate reviewed Mr. Fink's remission request and, in a memorandum dated July 23, 2015, refused to recommend remission. The CRA's Headquarters Remission Committee [Remission Committee] then met on September 9, 2015 to discuss various remission requests, including Mr. Fink's. In addition to receiving a copy of Mr. Fink's report and the July 23, 2015 memorandum, members of the Remission Committee were presented with a condensed version of the facts of Mr. Fink's case as well as a detailed summary of the application of the remission guidelines. The Remission Committee recommended that remission be denied.

[9] Following the recommendation of the Remission Committee, Mr. Trueman was provided with a copy of Mr. Fink's remission request, the July 23, 2015 memorandum, the minutes of the Remission Committee and a draft recommendation letter. By letter dated October 28, 2015, Mr. Trueman conveyed his decision not to recommend remission based on the following reasons: (1) Mr. Fink's circumstances were not the same as those of the SDL employees since Mr. Fink has participated in a "stock option plan", and not a "stock purchase plan"; (2) through a Consent to Judgment, Mr. Fink had already agreed to a reduction in the value of his ZCL shares and the

remission order process should not be used as an additional or parallel step to the appeal process already in place in the ITA to establish the validity of an assessment or a reassessment; and (3) while Mr. Fink had experienced a financial setback, there were no extenuating circumstances that could warrant remission as Mr. Fink had acquired the shares with the knowledge that the related employment benefit would be included in his taxable income that year and his investment decision to exercise the warrant to purchase the shares, to hold and sell those shares as well as his decision not to provide additional supporting documentation to the CRA at the objection stage were all decisions within Mr. Fink's control.

[10] Mr. Fink now seeks judicial review of Mr. Trueman's decision. He submits in essence that the decision is unreasonable because it fails to recognize the similarities between a stock option plan and a stock purchase plan. Mr. Fink further submits in the alternative, that Mr. Trueman, or his delegates, failed to exercise procedural fairness by breaching his legitimate expectations that a particular process would be followed and that a certain result would be reached, by fettering his discretion and by failing to provide adequate reasons.

III. Analysis

A. *Preliminary Matter*

[11] At the hearing, I raised the issue of the admissibility of Mr. Trueman's affidavit given that he was the decision-maker in this case. The affidavit of a decision-maker should not be used to supplement his reasons after the fact. However, upon review of Mr. Trueman's affidavit and accompanying exhibit, I am satisfied that they are admissible under the general background

information exception enunciated in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 20. I also agree that Mr. Trueman's cross-examination can be admitted not only under the same exception but under the exception that allows a party to provide information indicating the absence of the evidence before the decision-maker. As for Mr. Trueman's answers to the undertakings provided on cross-examination, they were provided pursuant to an order of this Court in *Fink v Canada (Attorney General)*, 2016 FC 843, affirmed by the Federal Court of Appeal in *Canada (Attorney General) v Fink*, 2017 FCA 87. As for the other evidence tendered by the parties, I was mindful for the purpose of these reasons of the general principle that the evidentiary record before a reviewing court on judicial review is restricted to the evidentiary record that was before the decision-maker, subject to the few exceptions recognized by the case law.

B. *Legislative Framework*

[12] A remission order is an extraordinary measure. It allows the Governor in Council, on recommendation of the appropriate Minister, to provide full or partial relief from tax, interest, penalty, or other debt, in those rare instances where relief would be justified but cannot be granted under existing laws. The legal authority to grant a remission order is set out in subsection 23(2) of the FAA, which stipulates as follows:

23 (2) The Governor in Council may, on the recommendation of the appropriate Minister, remit any tax or penalty, including any interest paid or payable thereon, where the Governor in Council considers that the collection of the tax or the	23 (2) Sur recommandation du ministre compétent, le gouverneur en conseil peut faire remise de toutes taxes ou pénalités, ainsi que des intérêts afférents, s'il estime que leur perception ou leur exécution forcée est déraisonnable ou injuste ou que, d'une façon

enforcement of the penalty is unreasonable or unjust or that it is otherwise in the public interest to remit the tax or penalty.	générale, l'intérêt public justifie la remise.

[13] While subsection 23(2) of the FAA provides the broad framework for which remission might be considered, the CRA has developed the Remission Guide to assist its officials in determining whether the collection of a tax or the enforcement of a penalty is unreasonable, unjust, or if the remission is otherwise in the public interest. Under the Remission Guide, each remission request is to be considered on its own merits and is assessed against a list of four (4) non-exhaustive factors which can support a positive recommendation: (1) extreme hardship; (2) financial setback coupled with extenuating factors; (3) incorrect action or advice on the part of the CRA officials; and (4) unintended results of the tax legislation. Other relevant factors to be taken into consideration include a person's compliance history, credibility, circumstances, age and health.

C. *Standard of Review*

[14] The parties agree that the reasonableness standard of review applies to Mr. Trueman's discretionary decision not to recommend remission. I agree. Subsection 23(2) of the FAA and the Remission Guide confer a broad discretion on the appropriate Minister and his officials. It follows that, in reviewing Mr. Trueman's decision, this Court must exercise restraint and deference (see *Jarrold v Canada (National Revenue)*, 2015 FC 153 at para 17; *Frank Arthur Investments Inc v Canada (National Revenue)*, 2014 FC 336 at paras 24, 34; *Twentieth Century Fox Home Entertainment Canada Limited v Canada (Attorney General)*, 2012 FC 823 at paras

18, 36, aff'd 2013 FCA 25; *Waycobah First Nation v Canada (Attorney General)*, 2010 FC 1188 at para 22 [*Waycobah First Nation FC*], aff'd 2011 FCA 191 at paras 12, 19; *Axa Canada Inc v Canada (National Revenue)*, 2006 FC 17 at para 23).

[15] Mr. Fink has framed the issue relating to the failure to provide adequate reasons as being a matter of procedural fairness. However, this issue is reviewable on the reasonableness standard since this is not a case where the decision-maker provided no reasons when required to do so (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 22 [*Newfoundland Nurses*].

[16] As for the standard of review that applies to the "fettering of discretion" allegation, there has been some confusion in the case law. While the issue has traditionally been seen as a matter of procedural fairness, reviewable on the standard of correctness, the Federal Court of Appeal suggested in S*temijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 [*Stemijon Investments*] that the fettering of discretion might equally be reviewable under the reasonableness standard. The Federal Court of Appeal was careful to state however that the fettering of discretion is always outside the range of possible, acceptable outcomes and is therefore, per se, unreasonable (*Stemijon Investments* at paras 23-25; see also *Waycobah First Nation FC* at para 23 where this Court came to a similar conclusion). For the purposes of this case, it is sufficient to conclude that the fettering of discretion would constitute a reviewable error on either standard.

[17] Having determined that the reasonableness standard of review is applicable to the issues above, when the Court is assessing reasonableness, it must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]; *Dunsmuir v New Brunswick,* 2008 SCC 9 at para 47 [*Dunsmuir*]).

[18] Conversely, questions involving the doctrine of legitimate expectations have been defined as being part of the doctrine of procedural fairness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26). While it has long been established that issues of procedural fairness are to be reviewed against the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Khosa* at para 43), the Federal Court of Appeal recently held that issues of procedural fairness do not necessarily lend themselves to a standard of review analysis. Instead, the role of this Court is to determine whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General*), 2018 FCA 69 at para 54; see also *Dunsmuir* at para 79).

D. *Reasonableness of the Decision*

[19] The essence of Mr. Fink's argument is that taxpayers in similar situations should be treated the same and that Mr. Trueman unreasonably denied his request for remission on the basis that he had participated in a "stock option plan" rather than a "stock purchase plan". Mr. Fink argues that this is a "distinction without a difference" given that under the ITA, the employee is taxed in an identical manner regardless of whether the employee acquires shares

under a stock option plan or a stock purchase plan. Where the shares are purchased at a rate that is less than the fair market value of the shares at the time of purchase, the employee is deemed to receive employment income. Consequently, Mr. Trueman should have recognized the material similarities between a stock option plan and a stock purchase plan in considering whether Mr. Fink was in the same circumstances as the SDL employees.

[20] Upon review of the record, I find that Mr. Trueman's finding is reasonable.

[21] Mr. Fink has himself acknowledged that there are differences between a stock purchase plan and a stock option plan. Under the stock purchase plan found in the record, the employee contributed a specified amount on a regular basis for a particular period of time. At the end of the period, the accumulated deductions were used to purchase the employer's shares at a pre-defined discount of the fair market value of the shares on either the day the employee entered the plan or on the last day of the accumulation period, whichever was lower. The employee could opt out of the stock purchase plan any time up to five (5) days before the purchase of the shares, in which case the employee would be refunded the amounts paid into the plan.

[22] Under his stock option plan, Mr. Fink could decide when to exercise his option to acquire the shares, providing that the warrants had vested. Mr. Fink had control over the timing of the purchase, the fair market value of the shares and resulting taxable employment benefit. This was one of the factors considered by Mr. Trueman in reaching his decision.

[23] Additionally, I note from the SDL Remission Orders that the SDL employees purchased their shares in 1999 and 2000. Mr. Fink, on the other hand, exercised his option to purchase the shares in 2007. While Mr. Fink contends that stock option plans and stock purchase plans receive similar treatment under the provisions of the ITA, he has not demonstrated to my satisfaction that both plans were in fact subject to the same fiscal treatment.

[24] I am further persuaded that Mr. Trueman's finding is reasonable when I consider the statements made by the Minister of National Revenue when he appeared before the Standing Committee on Finance in 2008. In briefing the members of the committee, the Minister of National Revenue explicitly pointed out that the SDL Remission Orders involved a stock purchase plan, not a stock option plan. He further indicated that this was an important distinction, as he had not recommended a remission order for a stock option plan at SDL Optics. The Minister later added that a key factor that caused him to believe that relief was warranted was that "the individuals affected were employees of a company that offered a stock purchase plan, but a stock purchase plan with specific features". Although I recognize that the Minister of National Revenue then states that the SDL plan offered employees the opportunity to purchase shares at a discounted price and as a result of this discount, they were not entitled to a tax deduction that other individuals who participated in share purchase plans and stock option plans were able to claim, it has not been demonstrated that this was the only factor considered by the Minister of National Revenue when he granted the SDL Remission Orders.

[25] Mr. Fink argues that the Minister of National Revenue indicated in his briefing that the reason he granted the SDL Remission Orders was that he considered "the thing to be unfair to

those individuals" and that if other people were in the same circumstances, they could apply to the CRA for remission. While it is unclear what the Minister was referring to when speaking of the "thing", I do not consider it reasonable to construe his statements as meaning that anyone who is unable to offset a capital loss against a stock option employment benefit would be entitled to remission. Such a broad interpretation would render the discretion in subsection 23(2) of the FAA meaningless. The Minister of National Revenue clearly indicated that each remission request had to be assessed on its merits and that the individual taxpayer's financial situation had to be considered.

[26] Mr. Fink further submits that Mr. Trueman's decision is unreasonable because there is no indication that Mr. Trueman considered the eight (8) mandatory conditions that the CRA applied for determining whether individuals qualified for inclusion in the SDL Remission Orders. Although framed as a procedural fairness issue, he also argues that Mr. Trueman fettered his discretion when he, or his delegate, failed to consider all of the conditions and assumed that Mr. Fink was required to be an employee of SDL and was required to participate in the SDL stock purchase plan during the years in issue.

[27] I am not persuaded by Mr. Fink's arguments.

[28] Among the eight (8) criteria identified for inclusion in the SDL Remission Orders, one required the employee to have participated in the SDL stock purchase plan. Another required the employee's participation in the SDL stock purchase plan to include the acquisition of SDL shares in the 1999 and 2000 taxation years. As Mr. Fink had not participated in a stock purchase plan

and he had not acquired his shares during the relevant period, he did not meet all of the requisite criteria for inclusion in the SDL Remission Orders. There is no indication in Mr. Trueman's decision that he assumed that Mr. Fink had to be an employee of SDL to be entitled to the same relief granted to the SDL employees. Moreover, if Mr. Trueman had considered himself bound by the eight (8) criteria, he would then have fettered his discretion.

[29] Finally, Mr. Fink contends that the decision lacks transparency because it does not address some of the factors that guided Mr. Trueman's staff in recommending the denial of remission and also, because it fails to address why the Applicant's participation in a stock option plan was a different circumstance from that of the SDL employees.

[30] Again, I do not find Mr. Fink's argument to be persuasive.

[31] Mr. Trueman reviewed the facts of Mr. Fink's circumstances, addressed both his grounds for relief and clearly identified why he considered Mr. Fink not to be in the same circumstances at the SDL employees and why there were no extenuating circumstances in his case. While Mr. Fink might have preferred more extensive reasons, Mr. Trueman was under no obligation to provide more fulsome or perfect reasons. As reasonableness is the standard, the reasons must simply allow me to understand why Mr. Trueman made his decision and determine whether the conclusion is within the range of possible acceptable outcomes (*Newfoundland Nurses* at para 16).

[32] Accordingly, on the basis of the foregoing, I am satisfied that Mr. Trueman reasonably found that Mr. Fink's circumstances were not similar to those of the employees covered by the SDL Remission Orders because he had participated in a stock option plan and not a stock purchase plan. This finding as well as his decision, when read as a whole, falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at para 47).

E. *Procedural Fairness*

[33] Alternatively, Mr. Fink submits that Mr. Trueman, or his delegates, failed to exercise procedural fairness on the basis that he breached the Applicant's legitimate expectations.

[34] Mr. Fink submits that when the Minister of National Revenue issued the SDL Remission Orders and made his statements to the Standing Committee on Finance, he had the legitimate expectation that a particular process would be followed and that a certain result would be reached. With respect to process, Mr. Fink contends that he legitimately and reasonably expected that he would be entitled to be considered in light of the eight (8) criteria that applied to the SDL employees without the imposition of a review of his financial circumstances. Mr. Fink also argues that he had a legitimate expectation as to the outcome, which required "more extensive procedural rights than would otherwise be accorded." He submits that these extended rights would have required the CRA to contact him in order to discuss whether the stock option plan and stock purchase plan should be treated as being similar, and required the CRA to provide additional information respecting the SDL Remission Orders. This would have then permitted Mr. Fink to make whatever submissions were necessary to be fully heard.

[35] In *Waycobah First Nation (FC)*, this Court held that the duty of fairness was situated at the lower end of the scale given that a decision to recommend or not recommend remission was different from a judicial decision as it involves a considerable amount of discretion and requires the consideration of multiple factors and also because remission of tax is an exception to the general principles of taxation (*Waycobah First Nation FC* at para 54).

[36] In my view, Mr. Fink's legitimate expectations must be considered in this context.

[37] At the outset, it is important to state that the doctrine of legitimate expectations does not give rise to substantive rights (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 97).

[38] With regards to Mr. Fink's expectation as to process, Mr. Fink seemed to suggest at the hearing that Mr. Trueman erred by applying the Remission Guide in his case even though it had not been followed in the case of the SDL employees. This argument is without merit.
Mr. Trueman first considered Mr. Fink's request on the basis of the SDL Remission Orders and found that Mr. Fink was not in the same situation as the SDL employees because he had not participated in a stock purchase plan. He then considered Mr. Fink's financial circumstances for the purposes of responding to the second ground raised by Mr. Fink in his remission request letter, namely the "financial setback coupled with extenuating circumstances" factor contained in the Remission Guide.

[39] Moreover, Mr. Fink has not demonstrated that the CRA had an ongoing obligation to inform the Applicant about its concerns regarding the distinction between a stock option plan and a stock purchase plan. Mr. Fink presented his request for remission and had the opportunity to provide arguments and evidence to the CRA before a decision was reached.

[40] Accordingly, I am satisfied that Mr. Trueman observed the duty of procedural fairness required in the circumstances of this case.

IV. Conclusion

[41] Given the highly discretionary nature of the remission of tax scheme and the considerable deference owed to Mr. Trueman's decision, Mr. Fink has not persuaded me that this Court's intervention is warranted. Accordingly, the application for judicial review is dismissed with costs.

JUDGMENT in T-2032-15

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed with costs.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

James C. Yaskowich	FOR THE APPLICANT
Margaret McCabe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Felesky Flynn LLP Barristers & Solicitors Edmonton, Alberta	FOR THE APPLICANT
Attorney General of Canada EPCOR Tower Edmonton, Alberta	FOR THE RESPONDENT