Federal Court  Cour fédérale

Date: 20231228

Docket: 23-T-124

Citation: 2023 FC 1757

[ENGLISH TRANSLATION]

Montréal, Quebec, December 28, 2023

PRESENT: Mr. Justice Gascon

BETWEEN:

CLINIQUE GASCON INC.

Applicant

and

HIS MAJESTY THE KING

Respondent

ORDER AND REASONS

I. Introduction

[1] The applicant, Clinique Gascon Inc. [Clinique Gascon], has filed a motion in writing under section 369 of the *Federal Courts Rules*, SOR/98-106 [Rules] to obtain an order of the Court granting an extension of time pursuant to subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7 [Act] to file an application for judicial review against a decision of the Canada Revenue Agency [CRA] rendered almost 21 months ago [Decision] on March 31, 2022. In the

Decision, the CRA refused to reassess Clinique Gascon for the 2016 taxation year after issuing an arbitrary assessment in 2018 because the statutory time to file its income tax return had expired.

[2] The respondent, His Majesty the King, represented by the Attorney General of Canada [AGC], objects to the motion for extension filed by Clinique Gascon.

[3] For the following reasons, and after considering Clinique Gascon's motion record and the AGC's responding motion record, the motion will be dismissed.

II. Background

[4] Clinique Gascon is a business corporation that provides dental care services and whose non-board member chief executive officer is Pascal Terjanian.

[5] In July 2018, the CRA issued an arbitrary notice of assessment to Clinique Gascon for the 2016 taxation year.

[6] Clinique Gascon claims that, on or about September 12, 2018, it sent the CRA, by mail, a paper version of its income tax return for the 2016 taxation year. However, there is no evidence on the Court's record that this paper version was transmitted or sent.

[7] On July 28, 2021, the CRA received Clinique Gascon's 2016 income tax return. On or about April 6, 2022, Clinique Gascon received a letter from the CRA dated March 31, 2022, informing it that its income tax return for 2016 had been filed late, that the CRA therefore could not issue a reassessment for that taxation year and that the CRA refused to process its return. This is the Decision that Clinique Gascon seeks to challenge in its application for judicial review.

[8] Following the Decision, Mr. Terjanian tried, unsuccessfully, to contact the CRA to obtain more information and convince it to change its stance. Clinique Gascon did not receive a response from the CRA, and the new accountant suggested sending the 2016 income tax return and adding the word [TRANSLATION] “amended” since, according to the accountant, the CRA must process income tax returns amended within 10 years.

[9] In April 2023, on the advice of its accountant, Clinique Gascon decided to send its 2016 income tax return to the CRA again. On April 21, 2023, the CRA sent Clinique Gascon another written notice that it could not process its request for changes because the time limit had passed.

[10] On or about August 8, 2023, Clinique Gascon received a formal requirement to pay from the CRA.

[11] On November 23, 2023, more than a month after Mr. Terjanian returned from vacation, Clinique Gascon filed this motion for an extension of time before the Court.

[12] I would like to take a moment to add that the receipt of Clinique Gascon’s 2016 tax return and its subsequent processing by the CRA are already the subject of a *mandamus* application in Court file No. T-2288-23.

[13] There is no doubt that Clinique Gascon did not file its application for judicial review of the CRA’s decision in a timely manner. The starting date of the filing period for such an application is 30 days from the time of the first communication of the Decision informing Clinique Gascon of the CRA’s refusal to process the 2016 tax return, which the CRA says it received in July 2021. However, the record shows that Clinique Gascon did receive and was informed of the Decision in early April 2022, more than 20 months ago.

[14] What remains to be determined is whether, under the circumstances, it is appropriate to grant the extension of time requested by Clinique Gascon.

III. Analysis

[15] To prevail on its motion, Clinique Gascon must meet the four criteria firmly established by the Federal Court of Appeal for granting an extension of time (*Thompson v Canada (Attorney General)*, 2018 FCA 212 at para 5 [*Thompson*]; *Alberta v Canada*, 2018 FCA 83 at para 44 [*Alberta*]; *Canada (Attorney General) v Larkman*, 2012 FCA 204 at para 61 [*Larkman*]; *Canada (Attorney General) v Hennelly*, 244 NR 399, 1999 CanLII 8190 (FCA) at para 3 [*Hennelly*]).

[16] These four factors are as follows: (i) whether Clinique Gascon had a continuing intention to pursue its application for judicial review; (ii) whether there is some potential merit to its application; (iii) whether the AGC or the CRA is prejudiced by the delay; and (iv) whether there is a reasonable explanation for the delay. Clinique Gascon has the burden of proving each of these factors (*Virdi v Canada (Minister of National Revenue)*, 2006 FCA 38 at para 2). However, the test is non-conjunctive: a motion for an extension of time may be granted even if not all the criteria are satisfied (*Alberta* at para 45; *Larkman* at para 62).

[17] That said, the power to grant an extension of time remains discretionary, and the four factors established by case law, while they frame the exercise of that power, do not limit that discretion. Ultimately, the overriding consideration in the exercise of the Court's discretion is that the "best interests of justice be served" (*Larkman* at paras 62, 85). The Court must therefore be flexible in considering each criterion to ensure that justice is done and decide whether it would be in the best interests of justice to grant the extension of time (*Alberta* at para 45;

Thompson at para 6; *Larkman* at para 62; *MacDonald v Canada (Attorney General)*, 2017 FC 2 at para 11).

[18] Having considered the parties' written representations, I am not satisfied that this is a situation in which I should exercise my discretion in favour of Clinique Gascon and in which it would be in the best interests of justice to grant an extension of time, because the evidence is wholly insufficient to satisfy the four factors that govern the exercise of my discretion. In particular, the evidence does not establish a continuing intention to challenge the CRA's decision by applying for judicial review, a basis for the judicial review sought by Clinique Gascon, or a reasonable explanation for the long delay in filing its application. Furthermore, the evidence supports the existence of some prejudice to the CRA given the lengthy delays since the Decision.

A. *Continuing intention to pursue application*

[19] An extension of time first requires Clinic Gascon to establish a continuing intention to pursue its application for judicial review during the lengthy period of over 20 months that has elapsed since the prescribed 30-day period. To be sure, through Mr. Terjanian, Clinique Gascon has made numerous attempts to convince the CRA to process its 2016 income tax return, which it claims to have sent in September 2018. However, there is no evidence on record as to Clinique Gascon's intention to seek judicial review against the CRA's decision to refuse to process Clinique Gascon's income tax return in March 2022 because it was filed late.

[20] I share the AGC's view that the actions and steps taken by Clinique Gascon to inquire about the progress of its file with the CRA or to find solutions with its accountants to convince the CRA to process its 2016 income tax return by means other than judicial review of the Decision cannot, as a matter of logic, prove a continuing intention to file an application for

judicial review within the 30-day time limit (*Laurent v Canada (Attorney General)*, 2023 FC 1439 at para 16).

[21] Although informed of the Decision in early April 2022, Clinique Gascon took no steps to contest, by applying for judicial review before this Court, the Decision and the CRA's refusal to process its 2016 income tax return. The choice to resend the return in April 2023 does not reflect a continuing intention to file an application for judicial review (1594418 *Ontario Inc v Canada (Attorney General)*, 2021 FC 157 at para 46).

B. *Merit of application*

[22] Moreover, whether in its written submissions or in the affidavits filed by Mr. Terjanian or the corporate accountant in support of this motion, Clinique Gascon remains entirely silent on the question of whether there is any legal merit to its application for judicial review of the Decision.

[23] Since the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the framework for analysis now rests on the presumption that reasonableness is the applicable standard whenever a court must decide the merits of an application for judicial review of an administrative decision such as the CRA's Decision. The presumption of reasonableness review can be rebutted in two types of situations: where the legislature has indicated that it intends a different standard to apply, or where the rule of law requires that the standard of correctness be applied (*Vavilov* at para 17). None of the exceptions apply here.

[24] The reasonableness standard focuses on the decision made by the administrative decision maker, which includes both the reasoning process and the outcome (*Vavilov* at paras 83, 87). Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paragraph 85). The reviewing court must therefore ask "whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility" (*Vavilov* at paragraph 99). However, the reviewing court must refrain from "reweighing and reassessing the evidence considered" by the decision maker (*Vavilov* at paragraph 125). Rather, the court must use restraint and intervene only "where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13). It is important to recall that reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers (*Vavilov* at paras 13, 75). For the reviewing court to set aside an administrative decision, it must be satisfied that there are sufficiently serious shortcomings to render the decision unreasonable (*Vavilov* at para 100).

[25] As the AGC rightly points out, in its motion for an extension of time, Clinique Gascon does not explain in any way how the CRA's Decision would be unreasonable.

[26] Clinique Gascon does not claim that the alleged sending of its income tax return in September 2018 was reported to the CRA prior to the Decision. It simply claims to have resent its income tax return twice, in July 2021 before the Decision and in April 2023 after the Decision. Furthermore, there is no evidence in the Court's record that would lead to the

conclusion that the CRA had before it clear and compelling evidence that a paper version of the 2016 income tax return had been sent.

[27] Also, it is clear that under the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA], subsection 152(4), Clinique Gascon's 2016 income tax return was clearly filed late when the CRA received it in July 2021.

[28] I therefore find that Clinique Gascon has not presented any persuasive grounds or arguments establishing the unreasonableness of the Decision or any likelihood of success in its prospective application for judicial review of the Decision.

C. *Prejudice*

[29] In the absence of evidence to the contrary, the arbitrary assessment issued by the CRA in July 2018 is presumed to be valid and reflects the amount owed by Clinique Gascon for the 2016 taxation year (ITA at s 152(8)).

[30] I accept the AGC's argument that, under the circumstances, the extension of time requested by Clinique Gascon would cause prejudice to the CRA because, as the administrative decision maker responsible for applying the ITA, the CRA defends the public interest and has a duty to ensure that the time limits for challenging its administrative decisions are respected, that finality is brought to administrative decisions and that they are implemented without delay.

D. *Reasonable grounds for delay*

[31] I will now address the last criterion established by case law, namely a reasonable explanation for the delay. I can only note once again that the evidence tendered by Clinique Gascon is silent on this question. I find no reasonable explanation in Clinique Gascon's

submissions or affidavits to justify the long delay of nearly 21 months it took to file its application for judicial review before the Court.

[32] As the AGC explained in his written submissions, Clinique Gascon's claim that its accountant's bad advice explains its delay in acting does not hold water.

[33] There is no explanation for the delay of almost one year between the first time Clinique Gascon consulted accountants in April 2022 and the next time, in March 2023. Similarly, no attempt was made to explain the delay between April and November 2023 following the CRA's second refusal to accept Clinic Gascon's resent 2016 income tax return. Clinique Gascon's record is equally silent and lacking in information and comments on why, between the requirement to pay in August 2023 and the filing of its motion for an extension of time on November 23, 2023, Clinique Gascon would have been unable to present its application for judicial review.

[34] It was up to Clinique Gascon to provide a reasonable explanation to justify the delay and explain why it took so long to apply for judicial review once it was able to do so. There is absolutely no explanation, no matter what segment of the nearly 21-month period one focuses on.

E. *Weighing the factors and serving the interests of justice*

[35] Weighing each of the factors set out in *Larkman* and *Hennelly*, and taking into account the circumstances of this case, I give determinative weight to the complete lack of justification for the very long delay and the failure to demonstrate the merit of Clinique Gascon's application.

After conducting my analysis, I cannot identify any reason that could allow me to grant an extension of time for filing Clinique Gascon's application for judicial review.

[36] It has been repeatedly acknowledged that undertaking judicial review of administrative tribunal decisions within the relatively short time limits prescribed by the Act reflects the public interest with respect to the finality of administrative decisions (*Canada v Berhad*, 2005 FCA 267 at para 60 [*Berhad*], leave to appeal to the SCC refused, 31166 (May 25, 2006); *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41 at para 24). That time limit is "not whimsical" and exists "in the public interest, in order to bring finality to administrative decisions" (*Berhad* at para 60).

[37] I acknowledge that the interests of justice remain the paramount consideration in granting an extension of time. But the interests of justice do not exist in a vacuum and do not absolve applicants from their duty to satisfy the burden of proof. In this case, to exercise my discretion in favour of Clinique Gascon would require me to ignore all of the established criteria regarding an extension of time and turn a blind eye to the lack of evidence supporting each of the factors set out in case law to consider granting such an extension. The rule of law is based on the fundamental principles of certainty and predictability. Discretion must be based on the law. Exercising such a power would not be appropriate or judicious, or in the interests of justice, if it ignored the minimum requirements of the applicable law.

IV. **Conclusion**

[38] Under the circumstances, I find that it is therefore not in the interests of justice to grant the requested extension of time.

[39] Furthermore, I am of the view that there is no reason to depart from the general principle that the unsuccessful party must bear the costs. I add that, under section 410 of the Rules, the costs of a motion for an extension of time are usually borne by the applicant. Exercising my discretion, I therefore award costs to the respondent and set the amount at $500.

ORDER in 23-T-124

THIS COURT'S ORDER is as follows:

1. The applicant's motion for an extension of time is dismissed.

2. Costs of $500 are awarded to the respondent.

"Denis Gascon"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	23-T-124
STYLE OF CAUSE:	CLINIQUE GASCON INC. v HIS MAJESTY THE KING

MOTION IN WRITING CONSIDERED AT MONTRÉAL, QUEBEC PURSUANT TO SECTION 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	GASCON J.
DATED:	DECEMBER 28, 2023

WRITTEN SUBMISSIONS BY:

Julie Tremblay	FOR THE APPLICANT
Guillaume Turcotte	FOR THE RESPONDENT

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