Federal Court Cour fédérale

Date: 20240619

Dockets: 24-T-68
24-T-69
24-T-74

Citation: 2024 FC 947

Ottawa, Ontario, June 19, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

Docket: 24-T-68

KM STRIKE MANAGEMENT INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

Docket: 24-T-69

ANCORA OPERATIONS INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

Docket: 24-T-74

STRIKE HOLDINGS INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] This decision addresses three similar motions, brought by the Applicant in each of the three within matters, in each case seeking an extension of time to file an application for judicial review of decisions by the Canada Revenue Agency [CRA] refusing to reassess the Applicant's tax position for certain periods or taxation years.

[2] As explained in greater detail below, I am granting all three motions as, having taken into account the relevant factors, I am satisfied that the best interests of justice are served by affording the Applicants an opportunity to pursue their applications for judicial review.

II. **Background**

[3] Each of the Applicants in the three related matters asserts that it or its investors or shareholders were the victims of a fraud committed by an officer and director of the Applicant in Court file no. 24-T-74, Strike Holdings Inc. [Strike], between 2012 and 2019, by falsifying trading account statements and other records to mislead investors.

[4] Strike asserts that, as a consequence of that fraud, falsified records were used to prepare its tax returns, resulting in over-reporting of its capital gains in its 2013 to 2018 taxation years and therefore overpayment of its income tax for those years.

[5] The Applicants in the other two matters assert that they provided management services to Strike and relied on Strike's falsified records in calculating management fees received from Strike and therefore in reporting those management fees as taxable sales on their GST/HST returns and remitting such tax with respect to the sales for certain GST/HST reporting periods in 2018 and 2019.

[6] In 2023, each of the Applicants requested that CRA reassess its relevant returns, for which inaccurate income or sales (as applicable) had been reported. Other than Strike's income tax return for the 2017 taxation year, CRA rejected those requests on the basis that the Applicant had exceeded the relevant limitation period under (as applicable) either section 152 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA] or section 298 of the *Excise Tax Act*, RSC

1985, c E-15 [ETA]. Those rejections are the decisions of which the Applicants wish to seek judicial review [Decisions].

[7] Subsequent to the receipt of those Decisions, the Applicants' counsel wrote to the Minister of National Revenue [Minister] on July 27, 2023, explaining the background to the Applicants' tax filings, including the fraud committed by Strike's former officer and director, and requesting that the Minister direct CRA to waive the applicable limitation periods. As no response was received, the Applicants' counsel sent the Minister a follow-up letter on behalf of each Applicant on December 7, 2023, requesting a response and advising that, if a response was not received promptly, the Applicant would have no choice but to consider other legal avenues to compel a response.

[8] In an affidavit sworn on April 19, 2024, by Mr. Roy Smith, a new director and shareholder of the Applicant, and filed by the Applicants in support of each of the three applications, Mr. Smith deposes that the Applicants' legal counsel received a call on January 18, 2024, from a representative of CRA's complaints office who advised that the Minister's office would be responding to the two letters from counsel. However, Mr. Smith states that, to the date of his affidavit, no response had been received.

[9] As such, on May 24, 2024, the Applicants filed the within motions for extensions of time to file applications for judicial review of the Decisions. In the absence of extensions, such applications would be out of time, as the Decisions were rendered on June 16, 2023 (in the case of Strike) and July 10, 2023 (in the case of the other two Applicants).

III. **Issue**

[10] The sole issue for the Court's determination in each of these motions is whether to grant an extension of time for the Applicant to file an application for judicial review of the Decision it seeks to challenge.

IV. **Analysis**

[11] The parties agree on the legal principles governing these motions. In addressing a request for an extension of time to commence an application, the Court should consider the following four factors: (a) whether there is a reasonable explanation for the delay; (b) whether there has been a continued intention to pursue the application; (c) whether the application has merit; and (d) whether the respondent would be prejudiced by the delay (*Canada (Attorney General) v Hennelley*, 1999 CanLII 8190 (FCA) [*Hennelley*]). This is a non-conjunctive test, in that a motion for an extension of time may be granted even if not all the factors favour that result (*Clinique Gascon Inc v Canada*, 2023 FC 1757 [*Clinique Gascon*] at para 16). Ultimately, the overriding consideration is that the best interests of justice be served (*Canada (Attorney General) v Larkman*, 2012 FCA 204 at paras 82, 85).

V. **Continued intention to pursue the application / reasonable explanation for the delay**

[12] In support of its position on the first two *Hennelley* factors, *i.e.*, that it has had a continued intention to pursue an application for judicial review and has a reasonable explanation

for the delay, each Applicant relies on the Applicants' counsel's correspondence with the Minister, commencing on July 27, 2023.

[13] The Respondent disagrees that the Applicants' counsel's correspondence demonstrates either an explanation for the delay or a continuing intention to pursue judicial review. The Respondent submits that counsel's correspondence requests a waiver of the statutory timeline and asks CRA to accept its readjusted filings but is silent about seeking judicial review. The Respondent refers the Court to *Clinique Gascon*, in which the Court found that the applicant's attempt to inquire about the progress of its file or convince the CRA to process its late return by means other than judicial review did not prove a continuing intention to file an application for judicial review (at paras 20-21).

[14] In reply submissions, the Applicants argue that *Clinique Gascon* is distinguishable. They emphasize that the correspondence upon which they rely was from their legal counsel, which raised concern about consistency and fairness in CRA's decision-making, as well as (in the second letter) referring to pursuing "other legal avenues."

[15] In my view, the Applicants' evidence on the first two *Hennelley* factors is weak. As the Applicants acknowledge, their counsel's correspondence does not explicitly refer to an intention to seek judicial review, and I accept the reasoning in *Clinique Gascon* (at para 20) that logically the pursuit of measures other than judicial review does not demonstrate an intention to pursue judicial review. However, I also accept that the evidence is somewhat more compelling than in *Clinique Gascon,* as the communications in the matters at hand emanate from legal counsel and

reference (albeit obliquely) recourse to legal remedies, and I accept the Applicants' argument that their counsel's correspondence represented an effort to raise the specter of legal remedies in a polite manner. In my view, the factor surrounding the intention to pursue judicial review favours the Applicants, although only marginally so.

[16] I am less convinced that this evidence demonstrates a reasonable explanation for the delay in commencing applications for judicial review. Following the Applicants' counsel's initial correspondence, many months passed before CRA indicated that a response would be forthcoming, and even that indication did not suggest the response would be favourable. I find no basis to conclude that the Applicants had a reasonable expectation that they would receive the requested relief and thereby avoid having to pursue judicial review. I therefore conclude that the factor requiring a reasonable explanation for the delay does not favour the Applicants.

VI. **Merits of applications**

[17] The Applicants seek to challenge the Decisions on the basis that CRA failed to recognize or reasonably exercise an available discretion to reassess the Applicants' returns notwithstanding that the usual limitation period had expired. They reference the fact that the relevant sections of the ITA and ETA both provide for the potential for such reassessment in certain circumstances involving misrepresentation or fraud.

[18] Although the relevant sections of the ITA and ETA are not identical, in broad strokes the Respondent argues that, in order for the discretion to reassess to be available, these sections require that the misrepresentation or fraud be that of the taxpayer. The Respondent argues that

the materials the Applicants provided to CRA in support of their reassessment requests referenced fraud but did not state who perpetrated the fraud. Emphasizing that the evidence in a judicial review application is generally restricted to the information available to the decision-maker, the Respondent submits that the Applicants' proposed applications therefore have no merit.

[19] I accept that the Respondent has stated arguable positions. I also recognize the differences in the relevant sections of the ITA and ETA, on the significance of which I have no substantive submissions from either party. However, I find compelling the Applicants' position, emphasized in their reply submissions, that CRA appears to have considered the relevant statutory authority to have been sufficient to authorize a reassessment of Strike's income tax return for the 2017 taxation year (a year in which the Applicants submit the reassessment was favourable to CRA). Without expressing any view on the likelihood of the Applicants' success in their proposed applications, I find that their arguments demonstrate sufficient merit to their applications that this factor favours granting the motion for an extension of time.

VII. **Prejudice to Respondent**

[20] The Respondent acknowledges, in each of the three motions, that it would not suffer any prejudice as a result of the delay in commencing the application.

VIII. **Conclusion**

[21] The last two factors considered above favour granting the Applicants' motions. Of the other two factors, one only marginally favours that result, and the other favours the Respondent. While the Applicants' case for an extension of time is not overwhelming, having considered the relevant factors together and taking into account the principle that the overriding consideration is that the best interests of justice be served, I am satisfied that extensions of time are warranted in the three proposed applications.

[22] As such, my Order will grant the Applicants' motions and afford each of the Applicants an extension of time to 30 days from the date of the Order to commence its application for judicial review. Neither party sought costs on these motions, and none will be awarded.

ORDER in 24-T-68, 24-T-69, T-24-T-74

THIS COURT'S ORDER is that the motion of each of the Applicants is granted, and each Applicant is afforded an extension of time to 30 days from the date of this Order to commence its application for judicial review. There is no order as to costs.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	24-T-68, 24-T-69,24-T-74
STYLE OF CAUSE:	KM STRIKE MANAGEMENT INC. v ATTORNEY GENERAL OF CANADA; ANCORA OPERATIONS INC. v ATTORNEY GENERAL OF CANADA; STRIKE HOLDINGS INC. v ATTORNEY GENERAL OF CANADA

ADJUDICATED BASED ON WRITTEN SUBMISSIONS

ORDER AND REASONS:	SOUTHCOTT J.
DATED:	JUNE 19, 2024

WRITTEN SUBMISSIONS BY:

Ian Morris Robert Winters	FOR THE APPLICANTS
Tiffany Glover	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Morris Kepes Winters LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT