

Date: 20070726

Docket: T-1569-06

Citation: 2007 FC 782

Vancouver, British Columbia, July 26, 2007

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**JIM'S PIZZA (1980) LTD. and
HANEY 2 FOR 1 PIZZA LTD.**

Applicants

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR ORDER AND ORDER

[1] In the present case, the principals of the two corporate Applicants who are in the restaurant and pizza production business respectively, failed to remit GST and payroll as required by law. As a result, hefty interest and penalties were imposed by the Respondent from which the Applicants applied for “fairness” relief pursuant to s.220(3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and s.281.1 of the *Excise Tax Act*, R.S.C. 1985, c. E-11.

[2] The fairness process resulted in three reviews and rejections of the Applicants’ plea, the last being a formal rejection dated August 1, 2006 which is the decision presently under review. The

reason for the rejection is capsulated by the decision-maker's informal comment on the record as follows:

Client made business decision to keep operating a business that appears to have been financially unviable. Circumstances are unfortunate but still no excuse for not filing and paying .

(Respondent's Record, p.12).

[3] The standard of review of the present decision is reasonableness (*Lanno v. Canada Customs and Revenue Agency*, 2005 D.T.C. 5245 (F.C.A.)).

I. *The relief provisions*

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

220(3.1) The Minister may at any time waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by a taxpayer or partnership and, notwithstanding subsections 152(4) to 152(5), such assessment of the interest and penalties payable by the taxpayer or partnership shall be made as is necessary to take into account the cancellation of the penalty or interest.

220(3.1) Le ministre peut, à tout moment, renoncer à tout ou partie de quelque pénalité ou intérêt payable par ailleurs par un contribuable ou une société de personnes en application de la présente loi, 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.

Excise Tax Act, R.S.C. 1985, c. E-11

281.1 (1) The Minister may

281.1 (1) Le ministre peut

waive or cancel interest payable by a person under section 280.

(2) The Minister may waive or cancel penalties payable by a person under section 280.

annuler les intérêts payables par une personne en application de l'article 280, ou y renoncer.

(2) Le ministre peut annuler la pénalité payable par une personne en application de l'article 280, ou y renoncer.

II. *The Guidelines for granting relief*

[4] While they are not binding on the Minister's discretion to grant relief, nevertheless, Guidelines entitled *Memorandum GST 500-3-2-1, Cancellation or Waiver of Penalties and Interest (March 14, 1994)* were followed in reaching the decision under review:

EXTRAORDINARY CIRCUMSTANCES

6. Penalties and interest may be cancelled or waived where they resulted from an extraordinary circumstance beyond the person's control, which prevented the person from complying with the Act. For example, one of the following extraordinary circumstances may have prevented a person from making a payment when due, or otherwise complying with the Act:

- (a) natural or human-made disasters, such as flood or fire;
- (b) civil disturbances or disruptions in services, such as a postal strike;
- (c) a serious illness or accident; or
- d) serious emotional or mental distress, such as death in the immediate family.

[. . .]

FACTORS

9. Where an extraordinary circumstance beyond the person's control has prevented the person from complying with the Act, the following factors will be considered by the Department to determine whether or not penalties and interest will be cancelled or waived:

(a) Does the person have a satisfactory history of voluntary compliance (i.e., have previous GST returns been filed and payments made on time)?

(b) Has the person knowingly allowed an outstanding balance to exist upon which the penalties and interest have accrued?

(c) Has the person acted quickly to remedy the omission or the delay in compliance, which originally resulted in penalties and interest being charged?

(d) Is there evidence that the person exercised reasonable care and diligence (e.g., planned for anticipated disruptions) and was not negligent or careless in the conduct of its affairs? The onus is on the registrant to keep abreast of any new developments in the administration of the GST so as to ensure continuing compliance.

(10) During the evaluation of these factors, the Department may contact the person and request further information or clarification concerning the circumstances under which penalties and interest became payable.

(Respondent's Record, pp.12-15)

III. *The fairness decision under review*

[5] The Applicants based their request for interest and penalty relief on a number of grounds including: the Applicants' business suffered from the introduction of the GST; legal action by the CRA to collect outstanding GST and payroll debt caused the Applicants hardship; the principals of the Applicants had their house expropriated in 1991, but was finalized in 1994; and one of the principals had hip and knee replacement surgeries and the other had arthritis and fibromyalgia.

[6] There was substantial consideration of the Applicants' arguments.

[7] The Applicant, Jim's Pizza (1980) Ltd., failed to remit GST for the period of February 28, 1997 to August 31, 1999. The Applicant, Haney 2 For 1 Pizza Ltd., failed to remit GST for the period from February 28, 1998 to November 30, 2002.

[8] The Applicants applied to the Minister for fairness relief with respect to their GST and payroll debt on July 29, 2004. The Minister was not prepared to consider the Applicants' request as the Applicants had not filed all their corporate tax returns, a payment proposal and financial statements. Further, the request did not specify what the Applicants were seeking.

[9] On January 10, 2005, the Applicants wrote to the Minister requesting the reversal of all interest from 1997 until the present time for both GST and payroll. The Minister treated this letter as the Applicants' first-level fairness relief request. An officer of Canada Revenue Agency (CRA) reviewed this request and concluded there were no circumstances to warrant the waiver of interest or penalties. The officer's report was reviewed by two members of the Fairness committee, who agreed with the officer's conclusions. The Minister notified the Applicants of its decision on February 8, 2005.

[10] In March 2005, the Applicants sent a letter to the Minister requesting a second level Fairness review, and provided additional information to the Minister. A CRA officer reviewed this request and concluded that there were no circumstances to warrant the waiver of interests or penalties. This

report was reviewed by two CRA managers and the Assistant Director of Revenue Collections at Burnaby-Fraser Tax Services. They all agreed with the CRA officer's report. The Applicants were sent a letter notifying them of this decision on August 19, 2005.

[11] On July 14, 2006, the Applicants sent the Minister a letter requesting a fresh second level Fairness review. A CRA Officer reviewed the Applicants' request which related mainly to the GST issue and prepared a report which concluded that there were no circumstances to warrant the waiver of interest or penalties. The following is my summary of the findings made:

Departmental Delay

- a. The Applicants, as of July 30, 2004, did not file their tax returns or financial statements despite being advised to do so on numerous occasions.
- b. There were no delays caused by the CRA that resulted in the imposition or unnecessary accrual of interest or penalties.

Illness and Expropriation

- a. There is no evidence to support the Applicants' contention that medical conditions of the principal affected the Applicants' ability to remit GST owing.
- b. Expropriation was finalized in 1994, prior to the relevant time period of 1997-1999 tax years, the principals lived in a house rent-free until 2003, the mortgage and title of the new property is in the name of the principal's three children, and the children financed the property with the principals as guarantors. All of this did not prevent the Applicants from meeting their tax obligations.

Financial Hardship

- a. The principals have \$250,000 in credit card debt.
- b. The Applicants have debt for workers compensation premiums.
- c. One of the principals admits to using the GST to pay the rent of and expenses of the business as late as January 20, 2005.

- d. Despite the repeated imposition of penalties, the Applicants have shown disregard.
- e. One of the principals stated that he used trust funds to keep his business going and will do so again if the need arises.

(See Respondent's Record, pp.123-125)

[12] A CRA Team leader reviewed the report and accepted the recommendations in it. In the end result, the Manager of the Revenue Collections Division of the Vancouver Tax Services Office reviewed the Applicants' file and the reports prepared on the third review of the Applicants' fairness arguments. In rendering the August 1, 2006 decision presently under review, the Manager came to his own conclusion on the evidence and arguments, and in the reasons provided, reiterated the findings of the CRA Officer.

IV. *The issue for determination: Is the decision under review unreasonable?*

[13] There are clearly limited circumstances in which the Minister may use discretion to waive penalties and interest (see: *Estate of the Late Henry H. Floyd v. M.N.R.* (1993), 93 D.T.C. 5499). According to the Guidelines as quoted above and applied in reaching the decision presently under review, the triggering event which allows relief to be given is "extraordinary circumstances" beyond a person's control. Once established, and before relief can be granted, these circumstances are considered together with a number of "factors" with respect to that person's remittance history.

[14] As first stated above, and it is admitted to be true, the overriding factor resulting in the imposition of the interest and penalties which were the subject matter of the relief application to the Minister is the Applicants' initial and continuing decision to use the GST collected to support their business ventures. Indeed, no extraordinary circumstance was shown to exist to the satisfaction of the Minister, and I can find no reviewable error in reaching this result.

[15] The decision cannot be found to be unreasonable if it can withstand a probing examination (*Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226). In my opinion, not only do the findings of fact and conclusions reached in the decision withstand a probing examination, there is no basis to say that they are in any way subject to attack for being reached in reviewable error. Indeed, I find that the fairness process engaged by the Applicants resulting in the decision under review was fairly and carefully conducted. I find no surprise in the result.

ORDER

For the reasons provided, this Application is dismissed.

“Douglas R. Campbell”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE: JIM'S PIZZA (1980) LTD. ET AL. v. CANADA
REVENUE AGENCY

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

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**REASONS FOR ORDER
AND ORDER:** CAMPBELL J.

DATED: July 26, 2007

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