Date: 20080623

Docket: T-1677-07

Citation: 2008 FC 793

Ottawa, Ontario, June 23, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ROBERT CROCIONE

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On February 8, 2002, Mr. Crocione's conscience got the better of him and he disclosed to Canada Revenue Agency that he had failed to report his income and GST obligations for the five taxation years 1997 to 2001. He sought relief under the Voluntary Disclosures Program.

[2] The reason why this matter is before this Court is largely, if not entirely, due to the failure of the official to whom Mr. Crocione spoke to register and process the call as a voluntary disclosure. Had that been done, no doubt the usual process would have been followed, resulting in an exchange

of correspondence between these parties as to the conditions required for the disclosure to be accepted as voluntary and establishing a timeframe for the filing of the delinquent returns.

[3] Because the usual process was not followed it appears to the Court that Mr. Crocione failed to properly expedite the filing of his delinquent returns and, in fact, he did not file his delinquent returns for another three years. Further, because the conversation was not properly recorded, the Agency initially took the position when the returns were filed in 2005 that there had not been any voluntary disclosure by Mr. Crocione.

[4] Ultimately, and after an application to this Court, the Agency was convinced otherwise and it accepts now that a voluntary disclosure was made by Mr. Crocione on February 8, 2002. As a result, the Agency waived the penalties associated with the delinquent returns for the five taxation years 1997 through 2001, inclusive. At issue in this application is the decision of the Agency not to include as a part of that voluntary disclosure Mr. Crocione's returns for 2002 through 2004.

[5] Section 220 (3.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) and section 281.1 of the *Excise Tax Act*, R.S.C. 1985, c. E-15, give the Minister of National Revenue the discretion to grant relief against the operation of certain sections of the Acts. Specifically, the Minister is authorized to waive or cancel some or all of the penalties or interest otherwise payable. The Minister's discretionary powers are largely exercised through the Voluntary Disclosures Program (VDP).

[6] The terms and conditions of the VDP in place at the date of Mr. Crocione's disclosure are contained in Information Circular 00-1 dated June 12, 2000. The document states that the purpose of the VDP is to promote voluntary compliance with the accounting and payment of duty and tax and to encourage taxpayers to come forward and correct deficiencies to comply with their legal obligations.

[7] Those who make valid voluntary disclosures for the periods under consideration are required to pay the tax and interest owing, but the Agency may waive or cancel penalties on those returns.

[8] Four conditions must be met for the voluntary disclosure to be valid: it must be voluntary, it must be complete, it must involve a monetary penalty and it must include information that is one year or more overdue. The first two of those pre-conditions are involved in this application and accordingly, I set out the relevant portions of the Circular:

> The disclosure must be voluntary. The client has to initiate the voluntary disclosure. A disclosure may not qualify as a voluntary disclosure under the above policy if it is found to have been made with the knowledge of an audit, investigation, or other enforcement action that has been initiated by the CCRA, or a related administration, such as other federal and provincial departments.
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> …
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> The disclosing client is expected to provide full and accurate reporting of all previously inaccurate, incomplete, or unreported information. While the information provided in a disclosure must be substantially complete, a disclosure will not be disqualified simply because it contains minor errors or omissions. However, if a disclosure is found to contain material errors or omissions, the disclosure will not qualify as a voluntary disclosure, with the result

> that the disclosed information may be processes, and interest and penalties can be applied to the entire amount.

[9] The Circular also sets out how a taxpayer may make a voluntary disclosure. It provides as follows:

> A person who wants to make a voluntary disclosure should contact the CCRA in person or in writing, provide the details of the disclosure, and show the above four conditions have been met. The person may make an interim submission. The final and complete submission must be filed within a period of time specified by the CCRA (normally 90 days from the date of the initial disclosure).

[10] Mr. Crocione provided an affidavit in which he attests that at the time he initiated the voluntary disclosure the officer to whom he spoke understood "what an enormous undertaking it was to sort through 30 odd shoe boxes and 3 garbage bags full of receipts along with tracking down lost receipts and replacement bills that had to be submitted and that the submission could not be done in the short length of time allotted". The Applicant attests that the officer said that "he would make a note on the account and that I must file all taxes together including the year filed in and that those years would also fall under Voluntary Disclosure".

[11] There are two aspects of this affidavit evidence that are of note. First, the Applicant appears to have had an understanding of the length of time normally allotted in which he was expected to file the returns, i.e. 90 days. Second, while the officer informed him that he was required to bring his filings up-to-date, there was no mention made of permitting him a number of years to effect the filings and, as he states, he was told that he was required to file these past returns "together". These

aspects of Mr. Crocione's affidavit are notable in that his returns were filed almost 1,200 days after the disclosure - not 90 days - and they were not filed together.

[12] Specifically, Mr. Crocione filed no income tax or GST returns with the Agency until mid 2005, more than three years following the date of his voluntary disclosure. On June 20, 2005, he filed his 2002 and 2003 returns and on August 23, 2005, he filed his returns for 1997 through 2001, inclusive.

[13] When submitting his returns for 2002 and 2003 he did so with a cover letter that stated in relevant part: "This disclosure is initiated with P.J. Flora in 2002 under voluntary disclosure all penalty and interest waivers.... remainder to follow once accountant is done with them".

[14] As previously noted, the Applicant's voluntary disclosure was not properly recorded by the Agency and when he initially filed these returns he was assessed interest and penalty. Mr. Crocione commenced in action and with the benefit of disclosure under the *Access to Information Act*, R.S.C. 1985, c. A-1, was able to convince the Agency that he had made a disclosure to Mr. Flora, an officer of the Agency, in 2002. Accordingly, in 2007 the Agency reviewed his case and accepted that the disclosure for his returns for the period prior to 2002 were covered by the VDP, but "given the extraordinary length of time between your initial disclosure and the date your T1 returns were actually filed, your correspondence of June 20, 2005 [submitting the returns] would be considered to be a second, separate disclosure of taxation years subsequent to the initial disclosure. Based on the facts of your situation, a disclosure relating to the 2002 - 2004 taxation years would not be

accepted, as CRA began taking enforcement actions against these years in 2004". The Agency also noted that at the time Mr. Crocione made his initial disclosure, the returns for 2002-2004 were not yet due. An internal appeal by Mr. Crocione was unsuccessful.

[15] Although a number of grounds of relief were set out in his application, it became apparent at the hearing that Mr. Crocione was asking this Court to review and set aside the decision of the Agency denying him a waiver of penalties with respect to his 2002-2004 tax and GST returns. He argues that the decision of the Agency was unreasonable in that the officer representing the Agency, Mr. P. J. Flora, had informed him when he made his voluntary disclosure that he was obliged to bring his returns up-to-date and therefore these later years should also have been covered by the voluntary disclosure he made.

[16] The decision of the Agency that is challenged is reviewable on the standard of reasonableness as described recently by the Supreme Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[17] Mr. Crocione submits that had the officer recorded the disclosure properly the enforcement actions taken in 2004 would not have occurred and the filing of his returns in 2005

would have been accepted as falling under the VDP. There is no evidence to support that position. Had the disclosure been properly recorded, as noted above, there would most likely have been steps taken to ensure that the delinquent returns were filed well before 2005. Mr. Crocione, having heard

nothing from the Agency between the disclosure date in 2002 and its compliance requests in 2004 appears to have acted at a very leisurely pace in organizing his returns. He knew that a relatively short time was provided in the Circular for compliance and rather than move expeditiously to place his affairs in order, he chose to continue burying his head in the sand concerning his responsibilities to the taxation authorities for the years 2002, 2003 and 2004 until they sought him out.

[18] In my view, the decision of the Agency in refusing to consider the returns filed for 2002, 2003 and 2004 as part of the initial voluntary disclosure was reasonable because:

1. They were not due when the initial disclosure was made in 2002;
2. There is no evidence that these returns could not have been filed on time as Mr. Crocione and his accountant worked to organize his returns for 1997 to 2001; and
3. Enforcement action had been commenced by the Agency prior to the filing of the 2002-2004 returns.

[19] Accordingly, this application is dismissed. Costs are fixed at $1,000.00.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed with costs fixed at $1,000.00.

"Russel W. Zinn"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1677-07
STYLE OF CAUSE:	ROBERT CROCIONE v. THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 10, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	June 23, 2008

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