F ederal Court  Cour fédérale

Date: 20091119

Docket: T-194-09

Citation: 2009 FC 1189

Toronto, Ontario, November 19, 2009

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

CRAIG McCRACKEN

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application deals with a judicial review of a decision made by the Canada Revenue Agency dated January 13, 2009 wherein it was determined that the Applicant Craig McCracken did not qualify for interest and penalty relief under the Voluntary Disclosures Program administrated by

that Agency. For the reasons that follow I am dismissing the application without costs to either party.

[2] The Applicant McCracken has for several years sold goods, largely small goods such as toys, on the internet through services by an organization known as eBay. That organization was recently the subject of decisions in this Court and the Federal Court of Appeal. In correspondence between the Applicant's solicitors and the Revenue Agency it was estimated that in the period from 2000 to 2006 McCracken's transactions were in the order of one million dollars, most individual transactions being in the order of under $10.00. McCracken did not keep good records of these transactions nor did he pay income tax or goods and services tax in respect thereof.

[3] On October 9, 2007 McCracken's solicitors wrote to the Revenue Agency seeking to make a voluntary disclosure of McCracken's activities on a "no-name" basis. By letter dated December 31, 2007 the solicitors disclosed McCracken's identity to the Revenue Agency and renewed an earlier request for a 90 day extension to file returns on McCracken's behalf. On January 8, 2008 McCracken's solicitors wrote a follow up letter to their letter of December 31, 2007 providing reasons for requesting the 90 day extension, namely:

a. Records had been requested from eBay but had not yet been provided
b. McCracken had received his bank records and recently was trying to use them together with other records to recreate his relevant income and expenses
c. McCracken's accountant had been on vacation

[4] On January 20, 2008 the Revenue Agency wrote to McCracken's solicitors granting a 60 day extension of time and advising that if all returns and adjustments had not been provided by March 10, 2008 the request for forgiveness of penalties under the Voluntary Disclosure Program would be closed.

[5] On March 10, 2008 McCracken's lawyers wrote to the Revenue Agency, not to provide the requested information but to ask for a further 60 day extension on the basis that eBay had still not provided the records that had been requested of them. This letter was followed by a further letter dated April 16, 2008 which outlined the various requests that had been made of eBay.

[6] On April 23, 2008 the Revenue Agency wrote two letters both from a Team Leader, Ms. Locke, one was sent to McCracken with a copy to his solicitors, the other was sent only to McCracken's solicitors without copying him. The letters are similar and identical in their result which was a denial of the request for a further extension, and each indicated that a second review of the matter could be undertaken. The letter addressed to McCracken stated, wrongly as the Revenue Agency's representative Miklos admitted on cross-examination, that complete information had to have been submitted at the time of the no name disclosure. The letter from the same person of the same date sent only to McCracken's solicitors states, correctly, that a final and complete submission needs only to be filed usually within 90 days from the initial disclosure but also states that the case was in any event closed.

[7] It is to be noted that at the time of the initial "no-name" disclosure the Revenue Agency had in place a written policy, IC00-IR respecting the Voluntary Disclosure Program stipulating a number of grounds for compliance including disclosures which could be followed up by other documents and verification. No provision was made for a second review.

[8] About two weeks after the Applicant's initial no-name disclosure the Revenue Agency published a second policy, IC00-1R2 as to the Voluntary Disclosure Program which was much more fulsome than the first. It provided, among other things, for closure of the file if complete information was not received within a stipulated time period in respect of no-name disclosures. It also provided for a second review which would *"review and reconsider the original decision."*

[9] By letter dated May 15, 2008 McCracken's solicitors requested a second level review thus presumably invoking the second version of the policy. That request identified a decision dated April 23, 2008 but did not say which letter was at issue or whether it was both. The letter was five pages long and reiterated the need for records from eBay that were not yet forthcoming. A request for a further extension of time of 60 days from receipt of the eBay records was made.

[10] The affidavit of Miklos, Assistant Director, Enforcement Division of the Revenue Agency paragraph 26 addresses a telephone conversation that he had on November 3, 2008 with a person he identified at paragraph 15 of the affidavit as a student-at-law in McCracken's solicitor's office. Paragraph 26 says:

> *26. I also spoke with Mr. Moussadji by telephone on November 3, 2008 to discuss this file. During that conversation he advised me*

> *that the T1 and GST tax returns necessary to complete Mr. McCracken's voluntary disclosure request had still not been completed, and that despite a letter threatening legal action, the eBay records had still not been received. I asked Mr. Moussadji why his firm had not proceeded with preparing Mr. McCracken's returns based on his banking records. Mr. Moussadji seemed uncertain and said that it must be that they need the eBay records.*

[11] There is no other evidence as to this telephone conversation. Mr. Moussadji was the Counsel appearing before me on McCracken's behalf. Rule 82 of this Court precludes a solicitor from giving evidence and arguing the same matter without leave of the Court. Mr. Moussadji would have been better advised to have somebody else argue the matter if he wished to elaborate on this evidence or contradict it. The Court is left with the impression that McCracken's solicitors were given an opportunity to submit further material or advise as to why that could not be done. In any event, nothing was provided. I note also in the evidence before the Court now correspondence between McCracken's solicitors and eBay was provided, but none of this was given to the Revenue Agency at the relevant time. As Miklos says at paragraph 27 of his affidavit:

> *27. I did not receive, review, or consider the documents found at Exhibits "K", "N", "O", "P", "R", "S", and "T" of Mr. McCracken's March 12, 2009 affidavit during the course of my second-level review of Mr. McCracken's voluntary disclosure request, or at any other time prior to my review of Mr. McCracken's March 12, 2009 Affidavit.*

[12] The decision resulting from the second level review is the decision now under judicial review. It is set out in a letter dated January 13, 2009 from Miklos to McCracken's solicitors and says, in the operative portion:

> *In your letter of May 15, 2008, you outline at some length the difficulties that were encountered in obtaining records from eBay and you point out that paragraph 53 of IC00-1R2 provides some*

discretion with respect to authorizing an extension to the time to complete the disclosure.
With respect to completeness, the disclosure was denied because the requested T1 and GST returns were not submitted during the time period stipulated. Pursuant to the VDP guidelines, you had 90 days to supply the returns from the effective disclosure date which was October 10, 2007. You subsequently requested and received a 60-day extension until March 10, 2008 to supply the returns. In his letter to you of January 10, 2008, Mr. Deszpoth granted the extension and advised that the VDP request would be closed if all of the requested returns were not received by the March 10, 2008 deadline. Your request for a further 60 day extension on March 10, 2008 was considered by Michele Locke, the VDP Team Leader and denied. In her letter she noted that even though the disclosure was initiated on October 9, 2007, records were not requested from eBay until January 17, 2008. Further, I noted in your letter of January 8, 2008, you indicated that bank statements for the relevant years had been received and that work was proceeding on recreating the income and expenses from the bank statements. It would seem that would have been the most practical way to proceed given the apparent resistance from eBay and the high transaction volumes that you indicate were the nature of the business. In reviewing the actions of the VDP Officer and Team Leaders, it is clear that they did exercise their discretion to grant a 60 day extension to the normal 90 day maximum and that this extension and the ramifications of not meeting the dealing were clearly communicated to yourself.

Paragraph 57 of IC00-1R2 states that "The CRA will not consider a request for a second review if a disclosure was denied because the information was not previously submitted within the stipulated time frame."

The circumstances of this case have been carefully considered and I regret to inform you that your request cannot be granted. As indicated in the VDP policy attached to our previous correspondence, four conditions must be satisfied to qualify for the benefits of the VDP. Unfortunately, the completeness condition has not been met as discussed above.

[13] McCracken's Counsel states that this decision contains several important errors:

a. it states erroneously, that records were not sought from eBay until January 17, 2008 whereas, Counsel says, there is nothing on the record to support that allegation
b. that the decision is based on the second version of the Voluntary Disclosure Program policy whereas it should have been based on the first which was the version in force at the time of the initial "no-name" disclosure
c. that the decision for the first time indicates that a recreation from bank records would have been appropriate but at the same time closes the file to any further submissions

[14] McCracken's Counsel argues that these errors constitute fundamental errors in law and that the decision must be reviewed on the basis of correctness.

[15] The Revenue Agency's Counsel acknowledges that errors were made such as saying, incorrectly that no requests were made of eBay before January 17, 2008 and, in one of the April 23, 2008 letters, that a complete disclosure had to be made at the time of the first "no-name" disclosure. She submitted that the first error was immaterial and that the second error was of no effect since the second level review was a full reconsideration of the matter, it was not in the nature of a judicial review nor an appeal of either letter of April 23, 2008. Counsel had no explanation as to why two different letters were sent on April 23, 2008.

[16] Revenue Agency's Counsel argues that an overall view of the matter be taken. Taxpayers are supposed to report annually providing complete information in their returns and pay their taxes

on time. The Minister has a discretion to waive penalties in the instances of those who fail to provide a complete information or to pay their taxes on time, but that is not a right that the taxpayer has, it is an exercise of discretion. The Revenue Agency publishes guidelines to assist those seeking to have the Minister exercise discretion. In this particular case at the second level the taxpayer and his solicitor was given ample opportunity to provide information and make submissions. The second level decision was fairly made on the basis of the evidence and arguments submitted.

[17] I am satisfied that the decision under review must be considered on a standard of reasonableness. The Revenue Agency was required to make factual, not legal, determinations. The essence of the decisions to be made was whether to grant the Applicant yet further extensions of time to complete his returns. Admittedly, the Applicant was being given the "runaround" by eBay, but he had other means at his disposal, such as bank records, so as to make a reasonable effort in completing his disclosure. As early as his solicitor's letter of January 8, 2008 the Applicant indicated that he was assembling bank records for this purpose. As late as the telephone conversation of November 3, 2008 the Applicant's solicitors were invited to submit bank records.

[18] In the case of *Canada Revenue Agency v. Telfer*, 2009 FCA 23 the Federal Court of Appeal stated that decisions such as this must be considered on the basis of reasonableness using context specific analysis. At paragraph 29 Evans J.A. for the Court wrote:

> ***29*** *While the formulation of the standard of unreasonableness as applied to the process for making discretionary decisions is invariable, its application is context-specific: compare Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal), [2008] O.J. No. 2150, 2008 ONCA 436 at paras. 21-22, where the Court "contextualized" the application of the unreasonableness standard to*

a tribunal's findings of fact. In determining whether the decision-making process in this case provided adequate justification,

> *transparency, and intelligibility in order to render the decision reasonable, I have taken into account the following considerations.*

[19] Where the Minister's extraordinary discretion is being invoked, broad latitude must be offered to the Minister as set out in paragraphs 33 and 34 of *Telfer, supra*:

> ***33*** *In these circumstances, Ms Telfer can hardly say that the Minister overlooked any relevant facts. The most that can be said is that the Minister failed to give sufficient weight to the fact that her tax liability was not settled until* Brown *was decided. Since deciding what weight to accord to a particular fact is at the heart of exercising discretion, it will normally be difficult to persuade a court that an administrative decision-maker has acted unreasonably in this regard.*
>
> ***34*** *Third, the nature of the discretion is another aspect of the context for determining whether an impugned decision is unreasonable. In this case, the refusal to grant relief against accumulated interest did not infringe any right or expectation of Ms Telfer's. On the contrary, she was invoking the Minister's extraordinary statutory discretion to grant her an exemption from a basic principle of the tax system, namely, that taxpayers are liable to pay taxes owing by April of the following year, failing which, they must pay interest, at the prescribed rate, on any amount owing.*

[20] In the present case the Minister's officials at the Revenue Agency gave appropriate opportunity for the Applicant and his solicitors to make submissions and provide evidence. The Agency arrived at a decision that is within the bounds of reasonableness. I will not set it aside.

[21] As to costs, the Revenue Agency made a number of gaffes, none of which, in the end result, is material to the outcome of the matter, but each of which demonstrates incompetence or lack of

[22] attention to the file. The same is apparent in respect of some of the steps taken on the Applicant's behalf. I will not award costs to any party.

JUDGMENT

For the reasons provided;

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed;

2. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-194-09
STYLE OF CAUSE:	CRAIG McCRACKEN v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
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APPEARANCES:

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