

Federal Court



Cour fédérale

**Date: 20100422**

**Docket: T-1082-09**

**Citation: 2010 FC 435**

**Ottawa, Ontario, April 22, 2010**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**NEDZA ENTERPRISES LTD.**

**Applicant**

**and**

**CANADA REVENUE AGENCY**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision by the Assistant Director of the Canada Revenue Agency's (CRA) Surrey Tax Services Office, dated June 5, 2009, not to grant the applicant taxpayer relief from the penalty levied against it under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) for repeat late filing.

[2] The Assistant Director determined that the extraordinary circumstances relied on by the corporate taxpayer applied to only one of its four directors and, as it had other directors, the taxpayer was not justified in filing its tax return late.

[3] For the reasons that follow, this application is dismissed.

### **Background**

[4] Nedza Enterprises Ltd. (Nedza) owned and operated a motel and restaurant in Prince Rupert, B.C.. Nedza's four directors each own one quarter of the shares in the corporation. They are Roy and Joyce Wong, and Roy's sister, Irene Mar, and her husband, Ray Mar.

[5] Roy and Joyce operated the motel while Ray and Irene had little involvement in day-to-day operations. When Roy developed a chronic heart illness his involvement in its operations diminished significantly. This left Joyce responsible for Nedza as well as the couple's other two small businesses.

[6] Nedza's fiscal year-end is May 31<sup>st</sup>. Corporate tax returns are due within six months after a corporation's fiscal year-end. Thus, Nedza was required to file its tax returns on or before November 30<sup>th</sup> of each year.

[7] Nedza sold the motel and restaurant business in June 2006 for \$1,259,999. The proceeds from this sale were included in Nedza's tax return for its fiscal year ending May 31, 2007 which was to be filed no later than November 30, 2007.

[8] On September 9, 2007, Joyce learned that her sister in Singapore had been arrested by the police for behaviour on her part that was caused by a mental illness from which she suffers. Joyce and Roy travelled to Singapore on September 10, 2007 and brought her sister back to Canada on September 27, 2007.

[9] Nedza did not file its 2007 return by November 30, 2007. On April 18, 2008 the CRA issued it a Request to File the return which was followed, on June 3, 2008, by a Demand to File.

[10] On July 9, 2008, Nedza requested, and was granted, a 60-day extension of time to file the return. On September 25, 2008 a further 60-day extension was sought and granted. Nedza had until November 15, 2008 to file its 2007 return and it did so on November 14, 2008.

[11] The Minister assessed Nedza, imposing a penalty for late filing and also a penalty for repeat failure to file of \$68,576.32 under subsection 162(2) of the Act. It is this repeat failure to file penalty that is at issue.

[12] By letter dated January 28, 2009, Nedza, under the taxpayer relief provisions, requested that the CRA cancel or waive the repeat failure to file penalty. In its submission, Nedza stated that

“Joyce and Roy Wong were unable to meet their tax obligations due to a series of extraordinary circumstances beyond their control.” These circumstances may be summarized as the following:

- (a) Roy has a heart condition and therefore Joyce manages all of their business and personal affairs;
- (b) Joyce’s sister was arrested in Singapore in September 9, 2007 and Joyce and Roy immediately flew to assist her, bringing her back to Canada on September 27, 2007;
- (c) Roy, Joyce and her sister were involved in a car accident on January 6, 2008;
- (d) Joyce and her sister travelled back to Singapore on May 6, 2008 and Joyce returned to Canada on May 22, 2008; and
- (e) Due to the stress of these events it took Joyce “several months to retrieve the documents required and compile the records to prepare the required filings.”

[13] The response of CRA dated March 17, 2009 reads in part, as follows:

Although we sympathize with Mrs. Wong regarding the unfortunate events she’s had to endure, it is the responsibility of all directors of a corporation to ensure various legal, financial and tax obligations are met. The documents provided do not demonstrate how Mrs. Wong’s hardship prevented the other directors from meeting the corporation’s tax obligations. Furthermore, a review of our records reveal [*sic*] this corporation has a history of late filing T2 returns. All the returns for tax years 1995 through 2007 have been filed from three to twenty-seven months late. This precedent does not demonstrate due diligence in the handling of this corporation’s tax affairs.

Based on the above information, the corporation’s situation does not qualify for cancellation of the repeat failure to file penalty, and the penalty will not be reversed.

[14] By letter dated March 23, 2009, the applicant requested a “second review” of the March 17, 2009 decision. The additional arguments advanced may be summarized as the following:

- (a) Although the company has four directors, Roy and Joyce have always looked after the financial affairs of Nedza and they have always signed the financial statements and tax returns of the corporation;
- (b) An extension of the time for filing was requested and granted by the CRA and thus, “it appears contradictory that an extension can be granted but then a penalty is being levied;” and
- (c) Although Nedza has been late previously in filing its returns, it always paid any related penalty and interest.

[15] This plea was rejected by letter of June 5, 2009. It is this decision that is under review. That decision states, in part, the following:

The responsibility for filing tax returns lies with the corporation’s directors and representatives. There existed three other directors that could have taken the applicable steps to ensure the corporation meet its tax obligations. When the tax returns could not be filed on time, the corporation should have submitted estimated tax returns prior to due date. These returns could have been adjusted at a future date, once the required information was available. The estimation of tax could have been made.

The extension to file the tax return was granted by the department to ensure compliance action would not be initiated during this time. Please be advised, an extension to file does not suspend penalties from being assessed.

After carefully considering the facts of the case along with your submissions as they relate to the applicable legislation, we have

concluded the decision made at the first level was appropriate. Your request for relief under Fairness Provisions of the Income Tax is therefore denied.

[16] At the hearing, the applicant sought leave to file an affidavit from its accountant. The respondent consented, subject to the correction of some dates therein, and I indicated that it was accepted subject to those corrections.

[17] This new evidence, which would have been available to the respondent, shows the filing history of the applicant for the three years preceeding the 2007 tax year. It shows that in each of those years the taxpayer filed its return late. Only in tax year 2004 was any tax owing, as the applicant had a loss in the next two years. The tax payable for tax year 2004 was \$5185.00 and it incurred a late filing penalty of \$118.56.

### **Issues**

[18] The issues in dispute, as disclosed in the parties' memoranda and oral submissions, are as follows:

1. Whether the Minister fettered his discretion;
2. Whether the Minister breached the duty of fairness in exercising his discretion; and
3. Whether the Minister's exercise of discretion was unreasonable.

## **Analysis**

### *1. Whether the Minister fettered his discretion?*

[19] The applicant submits that the Minister was “slavish to the guidelines ... treating them as too hard and fast where they are merely examples” and that he fettered his discretion as a result. Paragraphs 23, 24 and 32 of IC07-1 “Taxpayer Relief Provisions” provide guidance to those required to determine whether to cancel or waive penalty and interest assessments. The applicant submits that the Minister “glossed” over paragraph 24 which provides that “The Minister may also grant relief if a taxpayer’s circumstances do not fall within the situations stated in ¶23.”

[20] Specifically, the applicant submits that the Minister should have considered the amount of the penalty assessed in light of the size of the applicant’s previous assessments and its reasonable expectation that no repeat penalty would be assessed as none had been in the past.

[21] These may have been valid factors for the Minister to consider; however, they were not put before the Minister in the submissions made by the applicant. It is not required that the Minister turn his mind independently to every possible submission that a taxpayer may be in a position to make. What is required is that the Minister turns his mind to those submissions that were made and that was done by the Minister in this case.

### *2. Whether the Minister breached the duty of fairness in exercising his discretion?*

[22] The applicant submits that the Minister breached the duty of fairness by granting the applicant an extension of time to file its return but then assessed it with a late filing penalty having

failed to notify the applicant that all its directors were expected to take responsibility for the tax filing, and assuming that the other directors were capable of assuming this responsibility.

[23] This submission is without merit.

[24] Legitimate expectations *do not* create substantive rights: *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525. While the parties may have believed that the extension of time to file meant that they would not be assessed with a late filing penalty, let alone a repeat late filing penalty, there was nothing in the grant of an extension of time that suggested the potential for a late filing penalty did not exist. In any event, at the time the extension of time was granted, the applicant was already more than 7 months late in filing its return. The extension of time did not waive the CRA's discretion to apply a late filing or repeat late filing penalty in its assessment of the taxpayer. What the extension of time did was shield the applicant from liability for summary conviction based on non-filing, and the penalties that come with such a conviction: See subsection 238(1) of the *Income Tax Act*.

[25] When businesses are incorporated and individuals accept to become directors of those businesses they accept both the benefits and obligations that come with incorporation. One of those obligations is that directors equally share responsibility for meeting the corporation's tax filing requirements. Nedza could have been structured such that the passive investors were not directors, but it was not. The CRA was not obligated to explain the basics of business law to the applicant or its directors. The directors were responsible for understanding their own obligations and that of the



corporation they were charged with overseeing. The Minister did not breach the duty of fairness in taking the view that any of the other three directors could meet Nedza's tax filing obligations. No information was provided to the respondent that suggests that they could not have assumed that responsibility other than the statement made that they had not done so in the past.

3. *Was the Minister's exercise of discretion unreasonable?*

[26] The applicant submits that the Minister erred in considering that Nedza could have filed an estimated tax return in lieu of a certified correct return. The applicant further argues that the Minister erred in "assuming that the other directors had not been sidelined by relying upon the grant of an extension of time" and by taking an inconsistent position in applying a penalty after granting an extension.

[27] The Minister's mention of the applicant's failure to file an uncertified estimated return raises a question as there appears to be no statutory authority for such a procedure. Nonetheless, even if this statement was made in error, I am not satisfied that it renders the entire decision unreasonable. This factor was one of many on which the decision-maker relied. Central to the decision-maker's reasoning was that the extraordinary circumstances advanced by the taxpayer did not explain why the other directors ought not to be held to their duties and responsibilities to Nedza as directors. In my view, this finding was reasonable and determinative of the request for relief.

[28] In my assessment, the Minister considered all the submissions of the applicant, and reasonably concluded that these did not justify the other directors' failure to perform their roles as

directors of Nedza. In reaching this conclusion, the Minister did not fetter his conclusion and met the duty of fairness. For these reasons this application is dismissed.

[29] The respondent is entitled to its costs. The respondent may tax its costs in accordance with Rule 407 of the *Federal Courts Rules* or, in the alternative, the respondent may elect to have its costs in the amount I view to be reasonable, which amount is \$2000.00.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** this application is dismissed with costs in accordance with the Reasons for Judgment.

“Russel W. Zinn”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1082-09

**STYLE OF CAUSE:** NEDZA ENTERPRISES LTD. V. CRA

**PLACE OF HEARING:** VANCOUVER

**DATE OF HEARING:** APRIL 8, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** ZINN J.

**DATED:** APRIL 22, 2010

**APPEARANCES:**

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